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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1404

UNITED STATES OF AMERICA,
Appellee,

and

CLARK WALTER & SONS, INC.,
Appellant,

v.

WESTERN ELECTRIC COMPANY, INCORPORATED, *et al.*,
Appellees.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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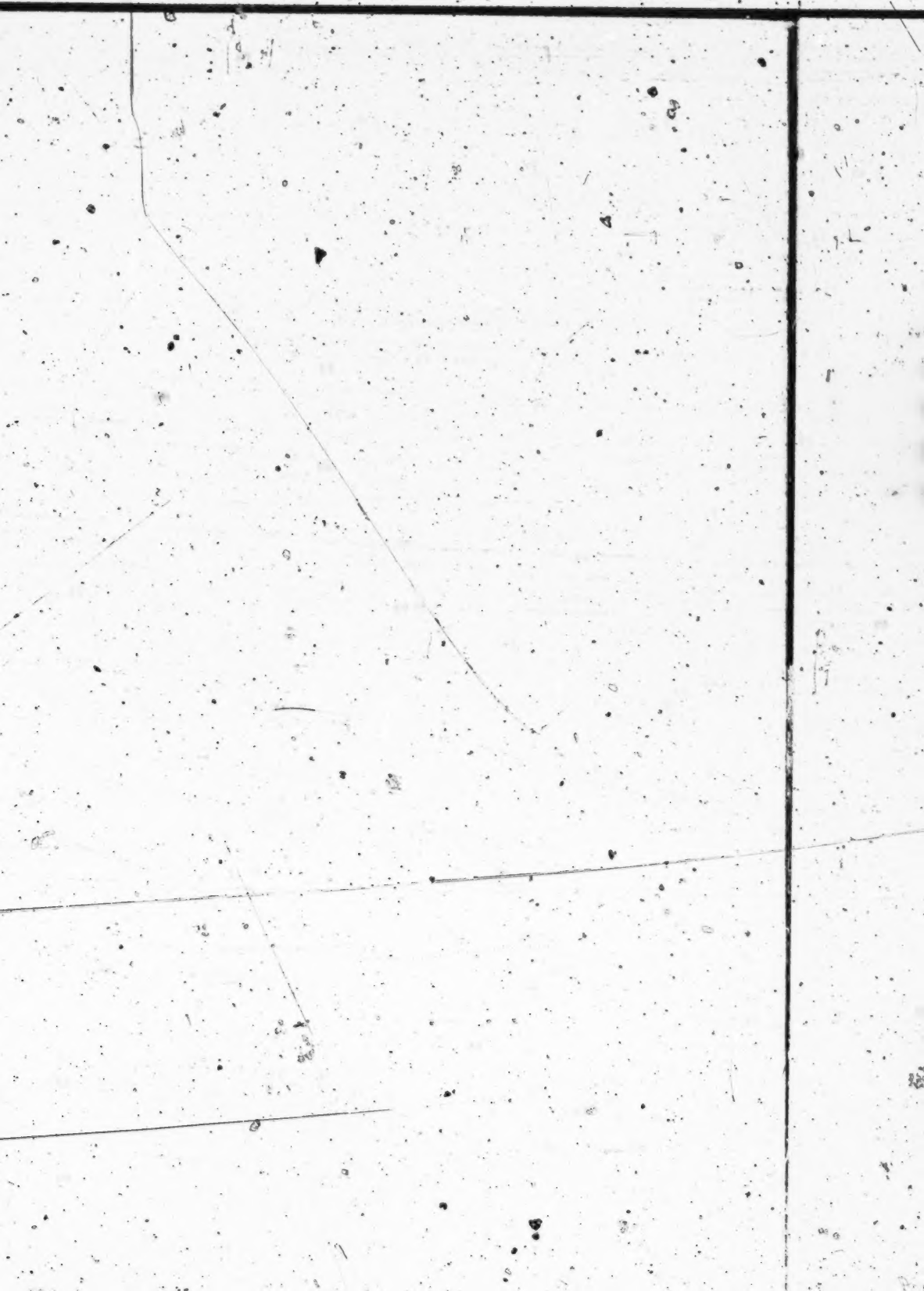

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ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the District of New Jersey, entered on February 26, 1968, denying its motion for intervention and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion below of the District Court of New Jersey is not reported. A copy of it is attached hereto as Appendix B.

Jurisdiction

This is a civil antitrust case brought by the United States under the Sherman Act. 15 U.S.C. §§1-3. The judgment of the District Court denying appellant's motion for intervention was entered on February 26, 1968, and notice of appeal was filed in that court on March 22, 1968.

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by the Expediting Act, 15 U.S.C. 29, which provides that in civil antitrust proceedings in which the United States is the plaintiff, an appeal from a final judgment will lie only to this Court. The following decisions sustain the jurisdiction of this Court under the Expediting Act where a private party has been denied permission to intervene:

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967);

Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502 (1941).

Question Presented

Does Rule 24 ("Intervention") of the Federal Rules of Civil Procedure apply to civil actions brought by the United States under the antitrust laws in which a consent decree has been entered?

Statement of the Case

This is an appeal by Clark Walter & Sons, Inc. ("Clark Walter") from an order entered by the United States Dis-

trict Court for the District of New Jersey on February 26, 1968 denying its motion for intervention under Rule 24 of the Federal Rules of Civil Procedure. The other parties to the appeal are the United States of America, the plaintiff, and American Telephone and Telegraph Company ("AT&T"), one of the defendants. The affidavits submitted by Clark Walter in support of intervention were not contravened by the other parties and, therefore, the facts, as they bear on this appeal, are not in dispute.

The action was brought under the Sherman Act by the United States in 1949 and concluded in 1956 by an injunction restricting AT&T to the business of furnishing common carrier communication services. See Appendix C. AT&T was given five years—until January 24, 1961—to discontinue furnishing all private communications services.[1] The reason that the government obtained the decree, as expressed in its brief below (p. 3), was that AT&T in seeking "to prevent the competitive development of alternative methods of communication * * * could use the resources of its telephone monopoly to eliminate competition in unregulated fields * * *." It is significant that AT&T consented to the entry of the decree.

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[1] ¶ V of the decree, which is still in effect, provides:

> "The defendant AT&T is enjoined and restrained from engaging either directly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply to (a) * * * (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment, * * *". (App. C, p. 11)

Clark Walter is a distributor in nothern New Jersey of private communication systems manufactured by Executone, Inc. ("Executone"). The annual gross sales of Clark Walter is about $900,000 (App. D. p. 39) of which one-quarter to one-third is derived from sales of the Executone nurse call system to hospitals. This is a typical private communication system serving a discrete population rather than the general public; it does not depend on common carrier circuits and poles located in public streets for its effectiveness (App. D, p. 42).

Following entry of the consent decree in 1956, AT&T and the Bell operating companies discontinued certain sales to private communications markets. For example, the New Jersey Bell Telephone Company ("New Jersey Bell") an AT&T subsidiary supplying common carrier communications service in New Jersey, withdrew its offering of a hospital voice paging system (App. D, p. 41).

In 1967, New Jersey Bell re-entered the private communications business by offering to hospitals its "Hospital Interphone" Service. The price or rate for the service is completely unregulated since no tariff has been filed by New Jersey Bell with the Board of Public Utility Commissioners of the State of New Jersey, which oversees intrastate utility services (App. D, p. 44). There is no dispute that the marketing of this system by AT&T will markedly impair the ability of Clark Walter to compete effectively in the nurse call market.

Shortly after the introduction of the Hospital Interphone in New Jersey, Clark Walter lodged a complaint with the Department of Justice and requested that steps be taken to enforce the consent decree. A reply was promised. Representatives of Clark Walter periodically inquired into the disposition of its complaint, but were told only that it was under study (App. D, p. 45).

After vainly waiting nearly six months to hear from the government, Clark Walter moved under Rule 24 for intervention to enforce the decree itself. No request was made to modify the decree or for monetary relief; Clark Walter asked only that AT&T abide by its agreement to withdraw from the business of private communications.

Both AT&T and the Attorney General opposed the application. In addition, the government took this opportunity to announce for the first time its position on the merits of Clark Walter's substantive claim: that the consent decree insulates AT&T from the Sherman Act "insofar as the nurse call services have been offered by AT&T under tariffs which subject the charges therefor to regulation."[2]

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[2] Brief of the United States of America in Court below, p. 3. If Clark Walter obtains a hearing on the merits, it will contend that this position improperly delegates federal antitrust enforcement to the state regulatory commissions, which consider such issues to be beyond their cognizance. The typical attitude is that of the California Public Utility Commission:

> "There is a fear that the commission is being used to subvert the intent of the Consent Decree. But the federal court has continuing jurisdiction and does not need the offices of the commission either to interpret or to enforce its order." *Re Pacific Tel. and Tel.*, 17 P. U. R. 2d 200, 212 (Cal. Pub. U. Comm. 1957), aff'd *sub nom Commercial Communications, Inc.* v. *Public Utilties Comm'n*, 50 Cal. 2d 512, 327 P. 2d 513 (1958), *cert. denied*, 359 U. S. 341 (1959).

The basis for the position of the Justice Department is ¶11(i) of the consent decree defining common carrier communications services as those for which the charges are "subject to regulation" by regulatory agencies (App. C, p. 8). Appellant contends that services "subject to regulation" are only those which cannot be offered without the approval of regulatory agencies, *e.g.*, common carrier telephone service, which depends on local franchise to locate poles and circuits in the public streets.

Even under the government's interpretation of the decree, however, AT&T is currently in contempt, no tariff for the Hospital Interphone ever having been filed by New Jersey Bell (App. D, p. 44).

The judge below acknowledged that on the record before him, AT&T was violating the decree (App. B, p. 2). He nevertheless denied the application of Clark Walter for intervention to enforce the decree. The only reason given for the decision was the public policy in favor of the entry of consent decrees. The Court, Hon. Robert Shaw, said that:

> "* * * [I]f non-parties could enter the picture to enforce consent decrees * * *, consent decrees would be very much discouraged." (App. B, p. 4)

He concluded that Rule 24 does not apply to any antitrust case in which a consent decree has been entered and that the decision of this Court last year in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967) is limited to cases which have been litigated on the merits rather than those that are settled by the entry of a consent decree (App. B, p. 5).

The Question is Substantial

Whether Rule 24 applies to consent decrees will, as a practical matter, determine the ability of a small company like Clark Walter to protect itself against unlawful competition. For the remedy to which appellant is referred by AT&T and the government—private antitrust litigation—can be a hollow one indeed. The consent decree in this case was entered only after seven years of litgation. Such an undertaking is obviously far beyond the means of Clark Walter. Intervention is its only realistic mode of relief.

If a consent decree wasn't involved in this case, appellant would unquestionably be entitled to intervene as of right under Rule 24[3] as interpreted last year by this Court in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra.* As a member of the class the decree was designed to protect, Clark Walter has an interest in its enforcement and is so situated that disposition of its complaint may as a practical matter impede its ability to protect that interest. The interest of Clark Walter obviously is not being adequately protected by the Department of Justice, which did not see fit to answer its complaint for a period of almost six months, and did so then only under the stimulus of a motion to intervene.

However, intervention was denied on the ground that "Congress entrusted the Department of Justice" (App. B, p. 5) with authority over antitrust litigation. A similar argument was advanced by Mr. Justice Stewart in his dissent to *El Paso,* contending that Sections 4 and 25 of Title 15 of the United States Code, which require government injunctive actions to be "under the direction of the Attorney General" are "violated when private parties are allowed to intervene and control public suits." 386 U. S. at 149. As is implicit in the majority opinion, however, these statutes "cannot be fairly construed to bear on the intervention

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[3] Rule 24 provides:

> "(a) Upon timely application anyone shall be permitted to intervene in an action:** (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.**"

issue at all". See Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 744 at n. 104 (1968).

El Paso makes clear that the power of the federal courts to require adherence to their decrees is not divested merely because the Attorney General is a party. His independence does not include the power to nullify a mandate of this Court or a decree of a district court. As a matter of sound public policy, therefore, "there may be more room for the 'private Attorney General' to be an advocate of the public interest in antitrust cases than had previously been recognized". Shapiro, *supra*, 81 Harv. L. Rev. at 746. Nonetheless, the court below held that Rule 24 does not apply to consent decrees but only to "a case that has been litigated on the merits" (App. B, p. 5).

What is the basis for this extraordinary ruling? Neither the Rule nor any statute accords to consent decrees such a unique procedural status. The only pronouncement of Congress that even mentions consent decrees states merely that they may not be used as *prima facie* evidence by a private party in an independent proceeding. See 15 U.S.C. §16(a). Surely this statute does not apply where, as here, a private party has not filed suit for damages, but seeks only enforcement of the decree which the government obtained but is now neglecting.

Nor is there any necessity for the rigid formula adopted below. Contrary to Judge Shaw's prophesy, allowance of Clark Walter's application will not open the door to an "impossible" "volume of litigation" (App. B, p. 4). Rule 24 has built-in safeguards against indiscriminate attempts to intervene. This is the rare occasion when an applicant can demonstrate conclusively that its interest is being inadequately represented by the government. It is necessary

to distinguish between an attempt by an intervener to modify a decree, which could unduly complicate and delay the main action, and a petition simply to enforce the decree, which would not have this effect. The decision below—that there can never be any intervention under any circumstances in a consent decree case—encourages multiple litigation of identical issues and denies the district courts all discretion and flexibility.

At the very least, this Court should exercise jurisdiction over this appeal in order to resolve the conflicting views taken by the federal district courts on the question of the applicability of Rule 24 to consent decrees. Contrary to the decision below, Hon. Sylvester Ryan, of the Southern District of New York, recently decided that Rule 24 authorized intervention by private parties seeking to enforce consent decrees. See *New Jersey Communications Corp.* v. *AT&T*, 67 Civil 3632, December 8, 1967. The unreported decision is reprinted in Appendix E hereto. Judge Ryan said:

> "It appears that the plaintiffs as competitors are beneficiaries of the consent final judgment and may seek to secure for themselves the benefits of that judgment. Plaintiffs may seek relief from the alleged anti-trust violations of defendants either by independent suit filed by them or by an application to intervene in the anti-trust action in which the judgment was entered, followed by further proceedings within that action to enforce the provisions of the judgment by contempt proceedings." (App. E, p. 52)

Judge Ryan further stated that *El Paso* "recognizes the right of intervention in a government anti-trust suit by one who makes a showing that he is directly affected by and a beneficiary of provisions in the final judgment" (App. E,

p. 52). Judge Shaw, on the other hand, ruled that *El Paso* does not apply to consent decrees (App. B, pp. 4-5). Furthermore, he accepted the position of the Justice Department that *El Paso* applies only when a mandate of the Supreme Court—not an inferior court—has been disobeyed.[4] In view of the large proportion of government anti-trust cases settled by consent decrees, see *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 69, 224 (1967), it is extremely important that this conflict be settled by this Court.

The court below conceded that the moving papers establish a violation of its decree (App. B, p. 2) but held, in effect, that nothing can be done about it. Surely, this is a situation proper for this Court's attention.

CONCLUSION

It is submitted that the decision below erroneously exempts consent decrees from the scope of Rule 24 and permits an acknowledged violation of the order of the court to remain unremedied. The question presented by this appeal is substantial and is of public importance in the administration of the anti-trust laws. Decisions of District Courts in the Second and Third Circuits are in conflict on the issue. It is respectfully requested that probable jurisdiction be noted.

Respectfully submitted,

HOWARD T. ROSEN,
WILLIAM J. O'SHAUGHNESSY,
Counsel for Appellant.

CLAPP & EISENBERG,
Of Counsel.

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[4] See Letter from D. F. Turner, Asst. Atty. General, Antitrust Div. to Emanuel Celler, Chmn, House Judiciary Comm., Mar. 17, 1967, in *BNA Antitrust & Trade Reg. Rep.* March 21, 1967, at X-1.

APPENDIX A

Order Denying Application to Intervene

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(Civil Action No. 17-49)

UNITED STATES OF AMERICA,

Plaintiff,

CLARK WALTER & SONS, INC.,

Applicant for Intervention,

vs

WESTERN ELECTRIC COMPANY, INCORPORATED, *et al.*,

Defendants.

This matter being opened to the Court by Clapp & Eisenberg, attorneys for Clark Walter & Sons, Inc., upon application for leave to intervene as a party plaintiff in this action; and this Court having considered the moving papers, memoranda of law, and argument of counsel;

IT IS on this 26th day of February, 1968, ORDERED and ADJUDGED that the application of Clark Walter & Sons, Inc. for an Order to Intervene as a Party Plaintiff in this action be and the same hereby is denied, with prejudice and without costs.

/s/ ROBERT SHAW
Judge of the United States
District Court

APPENDIX B

Oral Opinion Below

This comes before the Court on application for intervention. The application is by Clark Walter & Sons, Inc. Intervention is sought in an antitrust action brought by the Department of Justice and disposed of by consent decree entered January 24th, 1956.

The complaint in the antitrust action was filed January 14th, 1949. The applicant here, Clark Walter & Sons, Inc., is a distributor of private communication systems. It contends that the defendants, American Telephone & Telegraph Company and certain of its operating subsidiaries, including New Jersey Bell Telephone Company, are furnishing communication systems to hospitals in violation of Section 5 of the consent decree heretofore entered in this matter; and that though applicant has sought action on the part of plaintiff, that is the United States Department of Justice, to enforce the consent decree, plaintiff has not as of this time acted.

The pertinent portion of the consent decree that I have mentioned reads as follows: "Defendant, AT&T, is enjoined and restrained from engaging either directly or indirectly through its subsidiaries other than Western and Western subsidiaries in any business other than the furnishing of common carrier communication services."

It is contended here that the private communication system does not fall within the category of "common carrier communication system," and there seems to be very little doubt about that. Although I should qualify that statement by adding to it that the observation is made only on the basis of what has come to my atten-

tion through the moving papers. I don't intend that comment to indicate any opinion as far as the merits are concerned.

The only authority which seems persuasive to this Court favoring the granting of the application for intervention is the case of Natural Gas Corporation and others against El Paso Natural Gas Company, 366 U. S. 29 (1967). Perhaps I should also mention another authority that seems to be persuasive is an unreported decision of Judge Ryan in the Southern District of New York in the case of New Jersey Communications Corporation vs. AT&T.

Except for those decisions, the weight of authority seems to be very strongly against allowing intervention in antitrust suits brought by the Government in the public interest. However, we have a little bit more than that type of situation here, from a factual standpoint. Here, as distinguished from the El Paso case, there was a consent decree. Considerable time has elapsed since the entry of that consent decree. The Government has not repudiated its obligation to act in the public interest in the enforcement of the decree.

It, however, as the applicant contends, has not acted. It is the opinion of this Court that the El Paso case is not in point from the standpoint of facts. There, some three or four years ago, I believe, the United States Supreme Court ordered divestiture in connection with the merger of El Paso and Northwestern Pipeline in the business of furnishing natural gas for the State of California. In the recently decided El Paso case, the majority opinion of the Supreme Court indicates that it felt that the Government, by the consent decree of

divestiture, which was entered, was not abiding by the mandate of the Court; and the majority, speaking through Justice Douglas, said that the Government may not alter or modify a mandate of that Court by any consent decree. We don't have anything analogous to that situation here. In fact, it would seem to me, after giving consideration to the El Paso case, that, if it had not been for the intervenors, the matter of the Government bypassing the mandate of the United States Supreme Court could never have come before it on its own motion.

There are extraordinary circumstances in that case that I don't think are applicable here.

I feel that the reasoning of the United States against Blue Chip Stamp Company, 272 Federal Supplement, 432 (1967) is much more in point. See also Volume 81 of Harvard Law Review for a discussion of the application of Rule 24.

In conclusion, I feel that the application for intervention should be denied. This is an action which was commenced nineteen years ago and was settled by consent twelve years ago. A non-party to that action now seeks to reopen the case, and I do not think it would serve the public interest to permit that.

As I indicated during the course of argument, it seems that if non-parties could enter the picture to enforce consent decrees by seeking what the applicant seeks here, consent decrees would be very much discouraged. Moreover, if every party who could allege that it was the beneficiary of an antitrust decree could enter the picture to enforce the decree, we would have a volume of litigation that would be almost impossible for the Court to handle.

Appendix B

I think that Congress entrusted the Department of Justice with the enforcement of these decrees, and that only in the most unusual circumstances, where it clearly appears in a case that has been litigated on the merits, that the Department of Justice is, by such further action, to be taken in conformity with the Court's ruling, ignoring the mandate of the Court, as seems to be the case in El Paso, that relief by this type of intervention should be granted.

The application will be denied without costs. With prejudice but without costs.

APPENDIX C

Consent Decree (Re: *United States* v. *Western Electric Co., Inc. and American Telephone and Telegraph Co.*)

In the United States District Court for the District of New Jersey. Civil Action No. 17-49. Filed January 24, 1956.

* * *

Final Judgment

THOMAS F. MEANEY, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such complaint denying the substantive allegations thereof; and the parties, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issues of fact or law herein and without this Final Judgment constituting any evidence or admission by any party in respect of any such issues;

Now, therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of all parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I.

[*Sherman Act*]

This Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states a claim upon which relief may be granted against each

of the defendants under Sections 1, 2 and 3 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

For the purposes of this Final Judgment:

(a) "Western" shall mean the defendant Western Electric Company, Incorporated.

(b) "A T & T" shall mean the defendant American Telephone and Telegraph Company.

(c) "Bell Operating Companies" shall mean the 22 corporations listed in Appendix A attached to this Final Judgment, any other subsidiaries of the defendants engaged in furnishing common carrier communications services and the respective subsidiaries of and successors to each of the foregoing.

(d) "Companies of the Bell System" shall mean A T & T, Western, their subsidiaries and the Bell Operating Companies.

(e) "Westrex" shall mean Westrex Corporation, a Delaware corporation.

(f) "Patents" shall mean United States letters patent except for the reference to foreign patents in Section X(E)(3).

Appendix C

(g) "Bell System patents" shall mean patents owned or controlled by either of the defendants or any of their subsidiaries, and patents on inventions made in the course of their employment by employees of defendants and their subsidiaries (other than employees of subsidiaries exclusively engaged in the performance of contracts with the plaintiff) employed to do research, development or other inventive work, subject to any releases of rights to such employees prior to the date of this Final Judgment, and shall include patents of others under which and to the extent to which either of the defendants or any of their subsidiaries may have the right to grant licenses.

(h) "Equipment" shall mean appartus, systems, materials, supplies, machines, tools and any other product.

(i) "Common carrier communications services" shall mean communications services and facilities, other than message telegram service, the charges for which are subject to public regulation under the Communications Act of 1934, or any amendment thereof, or would be subject to such regulation thereunder if such a service or facility were furnished in interstate commerce; and shall also include any communications service or facility, other than message telegram service, the charges for which are or become subject to regulation under existing or future laws of any state, territory, or the District of Columbia, but only in the jurisdiction or jurisdictions in which the charges for such service or facility are subject to regulation.

(j) "Associated companies" shall mean, as to defendants, the Companies of the Bell System, and as to any applicant, its subsidiaries.

Appendix C

(k) "Person" means any individual, partnership, corporation, association, firm, trustee or other legal entity.

(l) "Message telegram service" shall mean the electrical transmission by a common carrier of a message presented to it at one of its public offices in written form or, if presented orally, reduced to written form by the carrier and delivered by the carrier to the addressee in written form or, if orally, by a reading of the written message by the carrier.

(m) "B-2 agreements" shall mean the license agreements dated July 1, 1932, made by either or both of the defendants with General Electric Company, Radio Corporation of America, and Westinghouse Electric Corporation, or any of them, and all agreements supplementary thereto, and "other parties to the B-2 agreements" shall mean said companies, their subsidiaries, successors and assigns.

III.

[*Applicability of Judgment*]

The provisions of this Final Judgment, applicable to a defendant, shall be binding upon said defendant, its officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with said defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Discontinuance of Types of Businesses*]

(A) The defendants are each enjoined and restrained from commencing, and after three (3) years from the

date of this Final Judgment from continuing, directly or indirectly, to manufacture for sale or lease any equipment which is of a type not sold or leased or intended to be sold or leased to Companies of the Bell System, for use in furnishing common carrier communications services, except equipment used in the manufacture or installation of equipment which is of a type so sold or leased or intended to be so sold or leased; provided, however, that this Section shall not apply to the artificial larynx, by-products of reclamation of scrap, or equipment manufactured for the plaintiff, or for plaintiff's prime or sub-contractors for the performance of contracts with plaintiff or sub-contracts thereunder.

(B) After three (3) years from the date of this Final Judgment, the defendant Western is enjoined and restrained from engaging, either directly or indirectly, in any business not of a character or type engaged in by Western or its subsidiaries for Companies of the Bell System, other than (1) businesses in which defendant A T & T may engage under Section V hereof, (2) businesses in which Western is required to engage under this Final Judgment, and (3) any business engaged in for the plaintiff or any agency thereof.

(C) No sale of any subsidiary or assets made necessary by this Section IV need be made otherwise than at a fair price and on reasonable terms nor shall it be made except to a person approved by this Court. Defendants may apply to this Court for an extension of the time established by this Section IV, upon notice to the plaintiff, and such extension may be granted upon a showing of good cause therefor.

Appendix C

V.

[*A T & T's Line of Business*]

The defendant A T & T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply to (a) furnishing services or facilities for the plaintiff or any agency thereof, (b) experiments for the purpose of testing or developing new common carrier communications services, (c) furnishing circuits to other communications common carriers, (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment, (e) directory advertising, (f) advice or assistance to other communications common carriers; or (g) businesses or services incidental to the furnishing by A T & T or such subsidiaries of common carrier communications services.

VI.

[*Distributorships*]

The defendants are each enjoined and restrained from making or performing, directly or indirectly, any contract or agreement with any person whereby either defendant or its subsidiaries will have any right in any territory to act as distributor of any equipment manufactured or sold by such person, or whereby such person

will have any exclusive right in any territory to act as distributor of any equipment manufactured or sold by either defendant or its subsidiaries; provided, however, that this Section shall not prevent the defendants or their subsidiaries from buying any equipment for sale or lease to, or supplying any equipment to, the defendants' associated companies or the plaintiff, or prevent Westrex and its subsidiaries from acting as distributor to sound recording studios or outside the United States, nor shall this Section be deemed to prevent the disposition in any channels of trade of any equipment originally acquired for sale to defendants' associated companies or to the plaintiff.

VII.

[*Purchase Contracts—Resale Prices*]

The defendants are each enjoined and restrained from making, performing or enforcing, directly or indirectly, any contract or agreement with any independent telephone operating company under which such company is required to buy any equipment from them (but this shall not apply to any specific purchase order or to any specific contract for the purchase of operating plant), or with any purchaser to limit, fix or control the prices to be charged by such purchaser on the resale of any equipment.

VIII.

[*Acquisitions of Assets or Securities*]

The defendants are each enjoined and restrained from acquiring, directly or indirectly, any person engaged in the manufacture, distribution or sale of equipment useful in furnishing common carrier communications services,

either by acquisition of securities thereof or by acquisition of its assets.

Nothing in this Section VIII shall be construed to prohibit:

(a) acquisition by either defendant of all or part of the securities or assets of its subsidiaries;

(b) formation of subsidiaries by either defendant and the transfer thereto of assets of either or of other subsidiaries of either;

(c) application to this Court, upon notice to the plaintiff, for permission to acquire the securities or assets of a person engaged in such manufacture, distribution or sale, which may be granted upon a showing that the effect of such acquisition will not be substantially to lessen competition or to tend to create a monopoly.

IX.

[*Cost Accounting Methods*]

Western is ordered and directed to maintain cost accounting methods that conform with such accounting principles as may be generally accepted and that afford a valid basis, taking into account the magnitude and complexity of the manufacturing operations involved, for determining the cost to Western of equipment sold to A T & T and Bell Operating Companies for use by them in furnishing common carrier communications services.

X.

[*Licensing of Patents*]

(A) The defendants are each ordered and directed to grant or cause to be granted, to any applicant who shall

make written application therefor at any time or from time to time, non-exclusive licenses under all claims of any, some or all existing and future Bell System patents to make, have made, use, lease and sell any or all equipment as desired by the applicant, such licenses (1) to be royalty-free, to persons other than the other parties to the B-2 agreements, under all Bell System patents (other than patents of Teletypesetter Corporation) issued prior to the date of this Final Judgment, under which licenses or sublicensing rights were exchanged between the defendants and such other parties to the B-2 agreements, (2) to be at reasonable royalties to the other parties to the B-2 agreements under the aforesaid patents, except that such licenses shall be royalty-free to any such other party during any period for which licenses granted by it to the defendants or either of them, of the scope and character which the defendants may require it to grant to them pursuant to this Section X(A), shall be royalty-free under all patents issued prior to the date of this Final Judgment under which, and to the extent to which, such other party or its associated companies may have the right to grant licenses, and (3) to be at reasonable royalties to all persons under all other existing and future Bell System patents; but upon condition that the applicant shall grant to defendants at reasonable royalties licenses to make, have made, use, lease and sell such equipment useful in furnishing common carrier communications services and such machines, tools and materials useful in manufacturing or operating any such equipment, as defendants may then designate in writing, under all claims of any or all existing and future patents under which, and to the extent to which, the applicant or its associated companies may have the right to grant licenses. Except with the consent of the grantor of any license hereunder, no such

license shall be under patents on inventions made more than five (5) years after the effective date of the license, but the applicant may make successive applications for licenses. Each grant of a license hereunder shall be for the unexpired terms of the patents under which such license is granted, or for such lesser period as the grantee shall elect, and shall include the right to sublicense the grantee's associated companies for so long as they remain associated companies.

The provisions of this subsection (A) requiring the defendants to grant royalty-free licenses under certain patents shall not be deemed to constitute a finding, determination or admission that such patents are without value or that the defendants are not entitled to full damages and an injunction in the case of infringemnt of any such patent by any unlicensed person.

(B) Upon receipt of a written request for a license under the provisions of this Section, the defendant to whom such request is addressed shall advise the applicant in writing of the royalty, if applicable, which it deems reasonable therefor, and also of such licenses as defendants may specify under subsection (A) above. If the parties are unable to agree within ninety (90) days upon reasonable royalties or any other terms, the applicant or such defendant may apply to this Court for the determination of reasonable royalties and other terms, and the defendants shall, upon filing or receipt of notice of the filing of such application to this Court, promptly give notice thereof to the plaintiff. In any such proceeding the burden of proof shall be on the defendant to establish the reasonableness of royalties or other terms requested by it, and on the applicant to establish the reasonableness of royalties or other terms requested by the applicant. Pending final determination of the foregoing, the applicant or

said defendant may apply to this Court to fix interim royalty rates and other interim terms and conditions. If this Court fixes such interim rates, terms and conditions, such defendant shall then tender and the applicant may then accept an agreement under which licenses shall be granted, in accordance with such interim determination, providing for the periodic payment of royalties, if applicable, at such interim rates for any manufacture, use, or sale under the patents involved. If the applicant fails to accept such license agreement or fails to pay interim royalties in accordance therewith such action shall be grounds for the dismissal of his application.

(C) The defendants are each enjoined and restrained from including in any license granted by them any restriction or condition whatsoever limiting the exercise of the rights granted thereby except that the license may be personal and non-transferable and may be conditioned on (1) payment of a reasonable royalty, if applicable, which shall be non-discriminatory as between licensees whose licenses are granted subsequent to the date of this Final Judgment, other than defendants' associated companies, but the royalty provisions of agreements under which licenses are exchanged and royalties are adjusted or eliminated to reflect a bona fide estimate of the values of such licenses shall not be deemed to discriminate between licensees, nor shall the bona fide compromise of claims for accrued royalty be deemed to be discriminatory, (2) subjection, to any grant of licenses and rights by applicant to the defendants, of patents of any company of which applicant is a subsidiary and subsidiaries of any such company and of patents on inventions made in the course of their employment, after the effective date of the license agreement, by employees of any such company, ap-

plicant or any of its subsidiaries employed to do research, development or other inventive work, and (3) such other terms as this Court shall approve upon application by the defendants and notice to the plaintiff. If the applicant shall so request, any agreement in which licenses are exchanged between applicant and defendants shall fix a reasonable royalty for each license, where applicable, rather than providing for the adjustment or elimination of royalties.

(D) Each license agreement executed pursuant to this Section X shall contain, if the licensor so requests, reasonable provisions requiring the licensee to keep records, submit royalty statements and give appropriate license notices, and for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee.

(E) Each license agreement executed pursuant to this Section X shall provide:

(1) That the licensee upon giving written notice to the licensor may cancel any such license for any specified equipment, but subject to paying accrued royalties.

(2) If any licensee requests, that such licensee may at any time surrender its license under any specified patent or patents identified by number by written notice to the licensor, but subject to paying accrued royalties. If any licensee requests, the license agreement shall also provide that upon such surrender the royalty rates shall be renegotiated if requested by the licensee in writing, and if there is a material difference between the reasonable value of the licenses granted to such licensee, in-

cluding the patents affected by such surrender, and the reasonable value of such licenses without such patents, then such rates shall be reduced by an amount representing such difference. In event of disagreement whether a reduction should be allowed or the amount thereof, the matter may be determined in the manner set forth in subsection (B) of this Section X.

(3) If any licensee requests, a royalty-free grant of immunity under all foreign patents owned or controlled by the licensor or its subsidiaries relating to the sale or use abroad of equipment manufactured under the license granted pursuant to this Section X.

(F) Each licensee of either defendant under a license agreement in effect at the date of this Final Judgment may cancel any licenses granted to it and its associated companies under such agreement by written notice to the licensor which shall terminate the obligation to pay royalty under the license agreement with respect to any equipment not manufactured, sold, leased or put into use under such licenses prior to such notice. Within sixty (60) days from the date of this Final Judgment, defendants shall mail a copy of the provisions of this Section X to all such existing licensees.

(G) The defendants are each enjoined and restrained, except where this Court upon application by a defendant and notice to the plaintiff shall find good cause therefor, from directly or indirectly:

(1) acquiring any license, grant of immunity or similar right under patents unless such license, grant of immunity or similar right shall be non-exclusive;

(2) disposing of any patents, or rights thereunder, so as to deprive defendants of the power to grant or cause to be granted licenses as required under this Section X unless it be a condition of such disposition that the transferee shall observe the provisions of this Section X with respect to the patents and rights so acquired and shall file with this Court, prior to such disposition, an undertaking to this effect; provided, however, that this subsection (G)(2) shall not be deemed to apply to (a) any transfer of patents or rights thereunder to the plaintiff or any agency thereof, or (b) a disclaimer, or a concession or other grant in interference proceedings; or

(3) granting or receiving any right to grant sublicenses under patents except to the grantee's associated companies for so long as they remain associated companies.

XI.

[*List of Unexpired Patents*]

Western is ordered and directed, upon written request of any person, to furnish to such person a list, prepared as of January 1 of the year in which the request is made, of unexpired patents owned by either defendant or its subsidiaries, identified with the classification of the United States Patent Office on the date of issue of such patents.

XII.

[*Acquisitions of Patents*]

The defendants are each enjoined and restrained from acquiring, directly or indirectly, title to any patent owned or controlled by any person other than Companies of the

Bell System and employees thereof, except where this Court, upon application by either defendant and notice to the plaintiff, shall find that otherwise the defendant could not obtain rights under the patent or that the only terms upon which the defendant could obtain non-exclusive licenses under said patent are unreasonable, provided that nothing in this Section XII shall be construed to prohibit the acquisition of patents on inventions made by other persons pursuant to any research or development contract with any Company of the Bell System.

XIII.

[*Payment of Patent Royalties*]

The defendant A.T & T is enjoined and restrained from receiving from the defendant Western any payment of patent royalty in respect of the manufacture, lease or sale of equipment by Western to the Bell Operating Companies.

XIV.

[*Technical Information*]

(A) The defendants are each ordered and directed upon written application at any time and from time to time, to furnish to any person domiciled in the United States and not controlled by foreign interests, licensed pursuant to Section X of this Final Judgment under any patents of either of the defendants, technical information relating to equipment specified in such application, to the extent and upon the terms hereinafter set forth.

(B) The technical information so to be furnished shall be information relating to equipment manufactured by Western for sale or lease to Bell Operating Companies or

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A T & T for which the applicant is licensed pursuant to Section X of this Final Judgment, and shall consist, to the extent that the defendants shall have, and have the legal right to furnish, the same, of manufacturing drawings and specifications of the materials and parts comprising such equipment, and manufacturing drawings and specifications covering the assembly, wiring and acceptance test requirements of such equipment.

(C) The defendants are each enjoined and restrained from including in any agreement, under which technical information is furnished pursuant to this Final Judgment, any restriction or condition whatsoever limiting the exercise of rights thereby granted to use such information, except that the right to use such information may be personal and non-transferable and may be conditioned on (1) payment of a reasonable charge or charges which shall be non-discriminatory as between recipients of such information pursuant to application made hereunder, other than defendants' associated companies, (2) the furnishing by an applicant to Western, upon payment of a reasonable charge or charges therefor, of its own technical information of the character and scope of that furnished by Western, but only respecting equipments for which the applicant has licensed defendants pursuant to Section X of this Final Judgment, and (3) such other restrictions and conditions as this Court shall approve upon application by either defendant and notice to the plaintiff.

Defendants' obligation to furnish technical information in any case shall be subject to such restrictions as may be imposed at any time by any department or agency of the plaintiff for reasons of national security.

(D) The reasonable charge or charges permitted by subsection (C) of this Section XIV shall be designed to reimburse the defendants or the applicant for the cost of gathering and reproducing the information furnished and for that proportion, if any, of the development expense that is reasonable and is properly allocable to the class of equipment with respect to which the information is being furnished. The amount by which such charge or charges collected by defendants shall exceed the cost of gathering and reproducing such information shall be credited to the development and related engineering expense accounts of Western.

(E) Each agreement under which technical information is furnished pursuant to this Final Judgment shall contain, if the party furnishing such information shall so request, reasonable provisions requiring the recipient of such information to keep records, submit statements respecting charges, keep such technical information confidential, and use such technical information only for manufacture pursuant to the license granted to the recipient of such information under Section X of this Final Judgment, and providing for periodic inspection of the books and records of such recipient by an independent auditor or any person acceptable to such recipient.

(F) A party shall not be deemed, in connection with the furnishing of technical information pursuant to this Final Judgment, to have given any warranty against infringement of patents of others, or any warranty of success in connection with the use of such information.

(G) In the event of disagreement as to the amount of the charge or charges payable under this Section XIV, the

matter may be determined in the manner set forth in subsection (B) of Section X of this Final Judgment.

XV.

[*Allocation of Fields of Manufacture—Patent Agreements*]

(A) The defendants are each enjoined and restrained from making, performing, enforcing or adhering to any contracts or agreements under which fields of manufacture, sale or distribution of any equipment are divided with others, provided that, subject to other provisions of this Final Judgment, an exchange of non-exclusive licenses and rights under patents, without more, between the defendants and others shall not be deemed to divide fields of manufacture, sale or distribution of equipment.

(B) The defendants are each enjoined and restrained from performing or enforcing any term or provision of any contract or agreement that (1) makes exclusive any licenses or other rights under patents, or (2) grants to one party the right to sue for infringement of the patents of another party.

(C) The defendants are each enjoined and restrained from enforcing any restriction or condition on any licenses or other rights under patents granted by either of them, that (1) imposes maximum quantity or dollar limitations, or (2) restricts sales to designated customers (except where sales are limited to subsidiaries, under existing licenses, or to the plaintiff); or (3) restricts the price at which licensed equipment may be sold.

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XVI.

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the principal office of either defendant, be permitted (1) reasonable access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding such matters, and upon request said defendants shall submit such written reports as might from time to time be reasonably necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section XVI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XVII.

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as

may be necessary or appropriate for the construction or carrying out of this Final Judgment, or the modification or termination of any of the provisions thereof or for the enforcement of compliance therewith or for the punishment of violations thereof. Upon any such application by the plaintiff, the plaintiff shall be deemed to have made a sufficient showing of a change in circumstances warranting appropriate modification of this Final Judgment if it shall show elimination hereafter, in a substantial number of states, of public regulation of charges for common carrier communication services.

Jurisdiction is further retained for the purpose of enabling the plaintiff to apply to this Court at any time, without the necessity of showing any change in circumstances, for orders under this Final Judgment:

(a) requiring sales, at non-discriminatory prices, of any telephone equipment manufactured by Western or its subsidiaries to independent telephone operating companies, or prohibiting or limiting sales, of such equipment to such companies; and

(b) requiring that any equipment manufactured by Western or its subsidiaries that is used by A T & T or any Bell Operating Company in furnishing a common carrier comunications service, other than telephone equipment, shall be sold at non-discriminatory prices to any person lawfully engaged in furnishing such a service in competition with them or in furnishing message telegram service, for use by such person in furnishing any such service; and

(c) requiring that A T & T shall, and shall cause its subsidiaries to, continue to lease, to common carriers engaged in the message telegram business, on reasonable

terms, circuits required by such carriers for use in their business, to the extent that such circuits shall be reasonably available without further construction.

APPENDIX A

Bell Telephone Company of Nevada

Illinois Bell Telephone Company

Indiana Bell Telephone Company

Michigan Bell Telephone Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

Northwestern Bell Telephone Company

Southern Bell Telephone and Telegraph Company

Southwestern Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

The Cincinnati & Suburban Bell Telephone Company

The Diamond State Telephone Company

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The Mountain States Telephone and Telegraph Company

The Ohio Bell Telephone Company

The Pacific Telephone and Telegraph Company

The Southern New England Telephone Company

Wisconsin Telephone Company

APPENDIX D

Applicant's Motions and Supporting Affidavits

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 17-49

UNITED STATES OF AMERICA,

Plaintiff,

CLARK WALTER & SONS, INC.,

Applicant for Intervention,

v.

WESTERN ELECTRIC COMPANY, INCORPORATED, *et al.*,

Defendants.

NOTICE OF MOTION BY CLARK WALTER & SONS, INC. TO INTERVENE AS A PLAINTIFF (RULE 24)

SIRS:

PLEASE TAKE NOTICE, that at 10 o'clock in the forenoon on February 13, 1968, or as soon thereafter as counsel can be heard, the undersigned will apply to the United States District Court for the District of New Jersey at the United States Court House, City of Newark, State of New Jersey, for an order permitting Clark Walter & Sons, Inc. to intervene as a plaintiff in this action in order to enforce com-

pliance with and to punish defendants for violation of the Final Judgment of this Court as set forth in its proposed motion of which a copy is hereto attached.

Applicant will rely on the affidavits attached hereto in support of this motion.

Dated: January 22, 1968

CLAPP & EISENBERG
Attorneys for Clark Walter & Sons, Inc., Applicant for Intervention
By HOWARD T. ROSEN
744 Broad Street
Newark, New Jersey 07102

To: ATTORNEY GENERAL OF THE UNITED STATES
United States Attorney for the District of New Jersey

PITNEY, HARDIN & KIPP, ESQS.
Attorneys for Defendants

Appendix D

[Motion to be Filed if Intervention is Granted.]

In the United States District Court
For the District of New Jersey

Civil Action

No. 17-49

United States of America,

Plaintiff,

Clark Walter & Sons, Inc.,

Intervener,

v.

Western Electric Company, Incorporated, *et als.*,

Defendants.

Motion to Enforce Judgment and to Hold Defendants in Contempt

Intervener, Clark Walter & Sons, Inc. shows to the Court as follows:

1. On January 24, 1956, this Court entered its Final Judgment against defendant American Telephone & Telegraph Company and certain of its operating subsidiaries, including defendant, New Jersey Bell Telephone Company, providing that:

"V.

"The defendant AT&T is enjoined and *restrained from engaging either directly,* or *indirectly through*

its subsidiaries other than Western and Western's subsidiaries, *in any business other than the furnishing* of *common carrier communications services; provided, however, that this Section V shall not apply* to (a) furnishing services or facilities for the plaintiff or any agency thereof, (b) experiments for the purpose of testing or developing new common carrier communications services, (c) furnishing circuits to other communications common carriers, (d) *for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment,* (e) directory advertising, (f) advice or assistance to other communications common carriers, or (g) businesses or services incidental to the furnishing by AT&T or such subsidiaries of common carrier communications services." (Emphasis supplied.)

2. Defendants have nevertheless wholly failed and neglected to comply with the provisions of said Final Judgment in that they are currently in the business of offering for lease in this district and elsewhere in the United States, in interstate commerce or otherwise, a service known as Hospital Interphone, a private communications system the charges for which are not subject to public regulation.

3. The refusal of defendants to obey said Final Judgment is calculated to impair and prejudice the rights of Intervener, in that Intervener is and has been continuously for many years engaged in the distribution in this District of

audio-visual nurse call systems manufactured by Executone, Inc. of Long Island City, New York. Said Hospital Interphone service is competitive with Intervener's audio-visual nurse call system, and its marketing by defendants presents a dangerous probability of injury to Intervener.

WHEREFORE, Intervener demands that compliance with said Final Judgment be enforced and that defendants be punished for their violation thereof.

CLAPP & EISENBERG
Attorneys for Clark Walter & Sons, Inc., Intervener
By HOWARD T. ROSEN
744 Broad Street
Newark, New Jersey 07102

To: Attorney General of the United States
Department of Justice
Washington, D. C. 20530

United States Attorney for
the District of New Jersey
Federal Square
Newark, New Jersey 07102

Pitney, Hardin & Kipp, Esqs.
570 Broad Street
Newark, New Jersey 07102

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action

17-49

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESTERN ELECTRIC COMPANY, INCORPORATED, *et al.*,

Defendants.

AFFIDAVIT OF MAURICE ROGEN

STATE OF NEW YORK }
COUNTY OF QUEENS } SS.:

I, MAURICE ROGEN, being duly sworn according to law, on my oath depose and say that:

1. I am the Vice President and Secretary of Executone, Inc. (Executone), a corporation of the State of New York, having its place of business at 47-37 Austell Place, Long Island City, New York, and have held these positions since 1962. Prior to 1962 I was for many years the General Manager of Executone. I have personal knowledge of the matters hereinafter referred to and make this affidavit on behalf of Executone.

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2. Executone was organized on January 5, 1937 for the purpose of engaging in the business of private intercommunication sound and signalling systems; we hold no franchises granted by governmental agencies. Our annual sales approximate ten million dollars, a large portion of which consists of the manufacture of communications equipment for installation in hospitals throughout the United States which we market through exclusive distributorship arrangements. Clark Walter & Sons, Inc. is our distributor in the fourteen northern counties of the State of New Jersey.

Executone and its distributors pioneered the development and marketing of the audio-visual nurse call system for use in hospitals. Through our Pennsylvania distributor, our first sale was made to Reading Hospital in Reading, Pennsylvania in 1947. This business has expanded to where it currently accounts for approximately 35% of the business of Executone and its distributors.

Some of the other manufacturers of audio-visual nurse call systems are: Motorola, Berkely-Fisher, Dukane, Stromcom, Auth Electric, Edwards Corporation, Bell Hospital Services, Standard Electric Time Company, Bogan, Standard Systems Company, and Couch Electric.

3. I try at all times to keep informed of the activities and products of our competitors in the audio visual nurse call business. Since existing and threatened intensification of competition from the American Telephone and Telegraph Company and its operating subsidiaries (the Bell System) is a source of special concern to us, I have given particular attention to their promotion of the "Hospital Interphone" system. For example, I know that sometime during 1964, the Bell System installed a nurse call system in the New England Baptist Hospital in Boston, Massachusetts, and

has subsequently installed the Hospital Interphone system in the U. S. National Health Institute, Bethesda, Maryland, Hale Hospital in Haverhill, Massachusetts, St. Joseph's Hospital in Superior, Wisconsin, St. Mary's Hospital in Milwaukee, Wisconsin, and has recently installed, on an experimental basis, a system in Sloane Kettering Hospital in New York City.

Also, in 1966 I visited the Bell System exhibit at the New York Coliseum where they displayed their Hospital Interphone system and distributed promotional literature of the kind annexed as Exhibit B to the affidavit of Clark Walter, Jr. I have also seen demonstrations of the Hospital Interphone at an American Hospital Association Convention in New York City and at a National Business Show. On each of these occasions, promotional literature was being distributed. Additionally, I have seen numerous Bell System advertisements for the Hospital Interphone system in magazines and trade publications with national circulation.

4. Wherever possible, our distributors, with the assistance of our counsel, have protested the filing of Hospital Interphone tariffs in state regulatory commissions. I have personally attended some of the hearings on these protests, and recall that in every instance where either I or our counsel brought to the particular commission's attention the terms of the 1956 consent decree prohibiting the Bell System from engaging in the business of private communications, the commission's position was that the federal antitrust implications of the consent decree were not matters within its cognizance or jurisdiction; we were told that a protest on this ground had to be made before the Federal Court for the District of New Jersey.

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5. I believe that the entrance of the Bell System into the nurse call market places us at a severe competitive disadvantage, and one which is unrelated to the technical or functional merits of the respective systems. As a matter of fact, I believe that our system serves the communication needs of the hospital more effectively and economically than does the Hospital Interphone.

The competitive advantage enjoyed by the Bell System is inherent in its franchise monopoly. For example, when a telephone company confers with the hospital authorities in the early planning stages about regular telephone service, it takes this opportunity to promote its "integrated" Hospital Interphone service, which combines in one unit a conventional telephone and a nurse call system, even though the operation of each is completely independent of the other. The hospital may well subscribe to the Bell System Hospital Interphone service instead of purchasing our system only because we are not authorized to offer conventional telephone service and because the telephone company may close the order before we or our competitors even know the job is available.

6. In my judgment Executone and its distributors can continue to compete effectively with the many other non-utility manufacturers and distributors of hospital communications systems. However, the inherent dominance of the Bell System in the common carrier communications field gives it a leverage in the private communications field which handicaps us and our competitors.

It is important to observe that depending upon the number of beds in a hospital, the cost to the hospital of an audio-visual nurse call system can be as high as $300,000. There-

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fore, the loss of the potential business of even one hospital is—to us and especially to our distributors—of serious financial consequence. It is extremely important to the private communications industry that the question of the illegality of the Bell System's participation in the nurse call market be resolved as soon as possible.

/s/ MAURICE ROGEN

Sworn and subscribed to before me
this 18th day of January, 1968.

/s/ RONALD BLOOM
Notary Public, State of New York
No. 41-5351397 — Queens County
Term Expires March 30, 1968

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action

17-49

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESTERN ELECTRIC COMPANY, INCORPORATED, *et al.*,

Defendants.

AFFIDAVIT OF CLARK WALTER, JR.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

I, CLARK WALTER, JR., being sworn according to law, on my oath depose and say that:

1. I am the Vice President, Treasurer and Chairman of the Board of Clark Walter & Sons, Inc., a corporation of the State of New Jersey having its place of business at 1283 Broad Street, Bloomfield, New Jersey. I have worked actively in an executive capacity in this business for more than twenty years. I have personal knowledge of the matters hereinafter referred to, and make this affidavit on behalf of Clark Walter & Sons, Inc. in support of its application for leave to intervene in this action.

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2. Clark Walter & Sons, Inc. (CW&S) is the corporate successor to a partnership formed by my father and brother in 1938. We are the exclusive distributor in the fourteen northern counties of the State of New Jersey for Executone, Inc., of Long Island City, New York, a manufacturer of private communications systems. Under the distributorship arrangement, we sell, install and provide maintenance service for the Executone systems within our territory. This is our only businesss.

Our gross income is about $900,000 per year. Our salesmen compete directly with salesmen of other voice communication systems employing private circuits as manufactured, for example, by Radio Corporation of America, Auth Electric Corporation, Edwards Corporation, Motorola Corporation, Rauland Corp., the Dukane Corporation, Bogen Intercommunication Systems, Inc., and others.

Our products and services may be contrasted with those of the telephone utilities who operate under franchises granted by governmental authorities for the purpose of supplying common carrier communications services, and who place their poles, lines and other facilities in the streets pursuant to special privileges granted by federal, state and local governments. We and the others in the private communications field do not possess exclusive franchises or the statutory authority to utilize public places for our circuits.

By reason of the franchises and other privileges enjoyed by the telephone companies, New Jersey Bell Telephone Company, and to the best of my knowledge, most of the other Bell operating companies are subject to regulation under state and federal law with respect to the rates they charge for all of their services. The charges of those in the private communications field which, as noted above, are

competitive and are not based upon governmental privileges, are regulated by the marketplace only.

3. On January 24, 1956 a decree was entered in this action which, among other things, enjoined the defendant American Telephone and Telegraph Company and its operating subsidiaries, including New Jersey Bell Telephone Company from engaging in the private communications systems business. This provision is found in Section V of the decree which reads as follows:

> "*The defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries* other than Western and Western's subsidiaries, *in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply* to (a) furnishing services or facilities for the plaintiff or any agency thereof, (b) experiments for the purpose of testing or developing new common carrier communications services, (c) furnishing circuits to other communications common carriers, (d) *for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment,* (e) directly advertising, (f) advice or assistance to other communications common carriers, or (g) businesses or services incidental to the furnishing by A T & T or such subsidiaries of common carrier communications services." (Emphasis supplied.)

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AT&T and the Bell operating companies have discontinued operations in *certain* private communications markets since the entry of the decree. For example, the New Jersey Telephone Company no longer offers voice paging systems to hospitals or "bell code" paging systems (coded, audible signals used to get someone's attention) to businesses.

4. Some seventeen years ago, Executone, Inc. introduced nationally an audio-visual nurse call system for hospitals and nursing homes. Shortly thereafter, CW&S sold the first such system in New Jersey to Orange Memorial Hospital in the City of Orange. Since then, our sales to this market have grown so that they now account for between one-quarter and one-third of our volume.

Prior to the availability of the Executone system, the private communications systems generally used by hospitals worked in the following manner: Within the easy reach of a patient was a call button, which, when pressed by the patient, activated a dome lamp in the corridor outside the patient's room and a buzzer signal, and perhaps also illuminated an annunciator at the nurses' station. However, the light signals only enabled the nurse to identify the particular patient who desired her attention, so that she could then walk to the room to determine his needs. A disadvantage of this system is readily seen. Regardless of the nature or urgency of the patient's needs, the nurse always had to personally visit the patient, resulting in unnecessary expenditures of her time.

Prior to the availability of the Executone system, as today, a patient might also have at his bedside the con-

ventional telephone offered by the Bell System. The primary function of this facility, of course, is to enable the patient to speak via a common carrier circuit with persons outside the hospital. This facility could only be used, however, by a hospital patient whose disability did not prevent him from raising the phone or using the dial mechanism. I do not consider the conventional telephone to be competitive with the Executone nurse call system. Each is designed to perform a different communication function—the one, a common carrier service, and the other, a private or internal communication.

The Executone audio-visual nurse call system overcame the deficiencies inherent in the previous simple buzzer-light system as well as those of the conventional telephone. Briefly, the system operates as follows: The patient presses a button at his bedside, thereby simultaneously signaling the nurses' station and illuminating the corridor dome lamp outside the patient's room. The nurse at the station then presses the button illuminated on the console before her, which simultaneously opens a channel for voice communication and turns off the dome lamp. The patient and nurse are then able to communicate directly with one another by voice. The advantages of this system are plain. The nurse need leave her station only if, on the basis of her discussion with the patient, she considers it necessary. Also, this discussion can occur without any effort being required of the patient beyond the initial depression of the activator button. A further description of this system is given by the leaflet attached hereto as Exhibit A. The Executone nurse call system is a typical private communication system since it enables conversation within a discrete population and is not dependent on circuits located in public places for its effectiveness.

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5. At the time the decree was entered on January 24, 1956, in this proceeding, neither New Jersey Bell Telephone Company, nor to the best of my knowledge, AT&T or its other operating subsidiaries, provided nurse call voice communications systems of a type or performing a function similar to that of Executone. As described above, the Companies of the Bell System did at that time offer to patients individual conventional telephones, but this did not and does not compete with our audio-visual nurse call systems or those offered by manufacturers of other private communications systems.

6. Within the past two years or so, at least some of the Bell Operating Companies have introduced an audio-visual nurse call system competitive with that sold by CW&S for Executone, Inc. This system, known as the "Hospital Interphone", is briefly described in the leaflet annexed hereto as Exhibit B. The major functional difference between the Hospital Interphone and our system is that the Hospital Interphone is housed in a unit possessing the separate, additional feature of a conventional telephone. The telephone, however, plays no part in the communication between patient and nurse. In both systems, private communication is conducted in substantially the same way. Indeed, the cord by which the telephone is attached in the patient's room or the nurses' station could be severed without in any way adversely affecting the use of the nurse call facility.

Since the right to engage in the business of furnishing common carrier telephone service is limited to companies operating under franchises from governmental authorities neither CW&S nor our private unregulated competitors are authorized to offer for sale a combined "pri-

vate-common carrier" communications system such as the Bell Hospital Interphone. Thus, while I believe that our private communications service is technically and functionally equal, if not superior, to the "Hospital Interphone", I believe that there is a strong likelihood that many customers will select the Bell audio-visual device over ours only because we are not able to offer conventional telephone service. Thus, in my opinion, the defendants are leasing and maintaining facilities for private communication systems, in violation of the decree of this Court, and are unfairly restraining competition among traditional suppliers to this market by capitalizing on the monopoly granted by the government to supply common carrier communications services.

7. Earlier this year the New Jersey Bell Telephone Company began to offer Hospital Interphone within the State of New Jersey. On information and belief, it distributed literature and demonstrated the system at a hospital trade association meeting in Atlantic City this past spring. Also, it has since provided a quotation for this service to the Morristown Memorial Hospital in Morristown. No tariff filing has been made by the New Jersey Bell Telephone Company with the Board of Public Utility Commissioners of the State of New Jersey to obtain approval of charges for this service.

8. It is my estimate, although I have not precisely surveyed the situation, that in the fourteen northern counties of New Jersey at least fifty percent of the hospital and nursing home beds are serviced by an audio-visual nurse call system, of which perhaps three-quarters were supplied by CW&S. The balance of the beds have only the old style buzzer-light signaling system described

above. A minor fraction of these beds may also be provided with a conventional telephone facility for use in making outside calls. It is my judgment that in the future we can continue to compete effectively with other manufacturers of private communications systems for the hospital nurse call market. However, the ability of the telephone company to capitalize on the monopoly position afforded by its franchise for common carrier communications services will markedly impair our ability to compete effectively in the hospital nurse call market.

9. On July 31, 1967 I met in Washington, D. C. with J. M. Toohey, Esq., an attorney with the Antitrust Division of the Department of Justice at his office at 1101 Pennsylvania Ave., N.W. I was accompanied by our counsel, Howard T. Rosen, Esq. of Clapp & Eisenberg, Newark, New Jersey, and counsel for Executone, Inc., Leon M. Labes, Esq. of New York City. On behalf of CW&S, I expressed our concern to Mr. Toohey about the Hospital Interphone Service and requested that the Department of Justice enforce the 1956 decree prohibiting the Bell Companies from engaging in the private communications field. I received a fair opportunity to present our position to Mr. Toohey, and he assured me that our complaint would receive the careful consideration of the Antitrust Division. After the conference I wrote Mr. Toohey and requested that we be kept advised of the disposition by the Justice Department of our complaint. A copy of his reply is attached hereto as Exhibit C-1. On September 13, 1967 our attorneys again wrote the Antitrust Division and requested that they be informed of the Division's decision on our complaint. A copy of this letter is annexed hereto as Exhibit C-2. On December 20, 1967, while in Washington, D. C. on another mat-

ter, I telephoned Mr. Toohey and expressed my concern at the continued silence of the Justice Department on my complaint. He assured me that the complaint was being studied by the Department. On December 22, 1967 our counsel again wrote to Mr. Toohey and indicated that if the Division did not take action, CW&S would have no alternative but to seek to intervene in the proceeding to enforce the decree itself. A copy of this letter is attached as Exhibit C-3. Although I respect the desire of the Antitrust Division of the Department of Justice to carefully investigate and evaluate any complaints before reaching a final determination, it is of vital importance to our company that the entrance of New Jersey Bell Telephone Company into the audio-visual nurse call field be arrested in its incipiency before severe injury is done to us.

/s/ CLARK WALTER, JR.
Clark Walter, Jr.

Sworn and subscribed to
before me this 16th day
of January, 1968.

ETTA G. LOWINGER
Notary Public of New Jersey
My Commission expires July 15, 1968

[EXHIBITS OMITTED]

APPENDIX E

Unreported Opinion in *New Jersey Communications Corp. v. American Telephone and Telegraph Co.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 CIVIL 3632

NEW JERSEY COMMUNICATIONS CORPORATION, ACTION SYSTEMS CO., Division of CONNECTICUT CONSOLIDATED INDUSTRIES, INC., L. J. LOFFLER, INC., TN TELEPHONE SALES CORPORATION, THE DELTA COMMUNICATIONS CORP., and PRIVATE COMMUNICATIONS ASSOCIATION, INC.,

Plaintiffs,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and NEW YORK TELEPHONE COMPANY,

Defendants.

The plaintiffs having moved for a temporary injunction and for an order holding the defendants in contempt of this Court, and the defendants having moved to dismiss the action pursuant to Rule 12 (b) Federal Rules of Civil Procedure on the grounds that the complaint fails to state a claim upon which relief can be granted, and that the Court lacks jurisdiction over the subject matter of this action, and the said motions having come on to be heard before the Honorable Sylvester J. Ryan, United

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States District Judge, and the Court thereafter on December 7, 1967 having handed down its memorandum endorsed granting defendants motion dismissing the complaint herein on the ground that this Court lacks jurisdiction over the subject matter and the Court in granting defendants' motion renders the plaintiffs' motion moot, and the Court having directed the Clerk of this Court to enter judgment dismissing the complaint, it is

ORDERED, ADJUDGED AND DECREED: That the defendants American Telephone and Telegraph Company and New York Telephone Company have judgment against the plaintiffs New Jersey Communications Corporation, Action Systems Co., a Division of Connecticut Consolidated Industries, Inc., L. J. Loeffler, Inc., TN Telephone Sales Corporation, The Delta Communications Corp., and Private Communications Association, Inc., dismissing the complaint herein for lack of jurisdiction over the subject matter.

Dated: New York, N. Y.
December 8, 1967

JOHN J. OLEAR, JR.
Clerk

Endorsement

67 Civ. 3632

Plaintiffs by this action seek to have this Court not only construe but enforce by a judgment of contempt some of the provisions of a final consent judgment entered in a Government anti-trust suit filed in the District Court for New Jersey.

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Plaintiffs have moved for a temporary injunction restraining a continuance of the alleged violations and for an order declaring that the defendants are in violation of some of the injunctive provisions of the final judgment and holding the defendants in contempt. Plaintiffs' motion, in effect, is one for summary judgment. The parties, by the submission of affidavits, have treated it as made under Rule 56, F.R.C.P.

Defendants have moved under Rule 12(b) for an order dismissing the complaint on the grounds that (1) the complaint fails to state a claim upon which relief can be granted; and (2) the Court lacks jurisdiction over the subject matter of this action.

We decide these motions in this one memorandum. We have concluded to grant the motion of the defendants and to dismiss the complaint. The dismissal renders plaintiffs' motion moot.

All of the plaintiffs are New York corporations, excepting Action Systems Co., which is a Connecticut corporation, and New Jersey Communications Corporation, which is a New Jersey corporation. Defendant American Telephone and Telegraph Company is a New York corporation, as is defendant New York Telephone Company (a wholly owned A.T. & T. subsidiary).

Plaintiffs' claims here asserted are alleged to arise out of violations charged to have been committed by the defendants of the provisions of a Final Judgment, entered by consent in the United States District Court for the District of New Jersey on January 24, 1956 in an action filed by the United States under the anti-trust laws (United States v. Western Electric Company, Inc., and American Telephone and Telegraph Company, 1956 Trade Cas. par. 68,246).

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Jurisdiction is invoked in the complaint filed in this Court on September 22, 1967 upon the ground that there exists "a federal question arising out of a judgment rendered by the United States District Court for the District of New Jersey."

Although defendant New York Telephone was not a defendant named in the New Jersey anti-trust action nor a party to the consent Final Judgment, plaintiffs allege that it had actual notice of the final judgment and knowingly acted in concert with or participated in the alleged violations of the final jrdgment with its parent company, A.T. & T.

The complaint alleges that the plaintiffs are all "in the business of installing private intercom and telephonic communications systems" except plaintiff Private Communications Association, Inc., which is an installer of such systems. Six specific violations of the final judgment are pleaded in the complaint. They add up to a charge that the alleged violations consist of providing such systems for various uses including use on farms, between rooms in a private home, in hospitals, in apartment houses and in different areas in business operations; and in experiment for development of further uses in private communication systems. These alleged violations, plaintiffs plead, are "calculated to impair, defeat, impede and prejudice the rights of the plaintiffs." Plaintiffs also charge that, because of the fact that the defendants are protected monopolies as public utilities, they, by reason of the violations of the final judgment, are unfairly competing with all of the plaintiffs except Private Communications Association in the installation and servicing of private communications systems.

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Plaintiffs ask for a judgment declaring that the acts of the defendants as alleged are in violation of the consent Final Judgment; enjoining defendants from continuing to commit such acts; and holding the defendants in contempt of this Court by reason of the commission of the acts charged to them in the complaint.

A copy of the consent Final Judgment is before us on those motions. We note that paragraph XVII of the judgment provides for the retention of jurisdiction by the District Court of New Jersey to permit any of the parties, to apply to that Court for construction, enforcement, modification or termination of the judgment, or the punishment of violations. It provides that:

> "Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of carrying out of this Final Judgment, or the modification or termination of any of the provisions thereof or for the enforcement of compliance therewith or for the punishment of violations thereof."

We assume (as we must) that the District Court of New Jersey had jurisdiction over the person of the defendants before it and of the subject matter of the Government antitrust complaint when the consent Final Judgment of January 24, 1956 was entered. We also assume that the District Court of New Jersey acted within its constitutional powers when it fashioned the provisions of the final judgment, which defendants are charged with violating. Since we consider the defendants' challenge only to the jurisdiction of

this Court, the merits of the positions taken by parties concerning the facts in controversy are not before us.

It appears that the plaintiffs as competitors are beneficiaries of the consent final judgment and may seek to secure for themselves the benefits of that judgment. Plaintiffs may seek relief from the alleged anti-trust violations of defendants either by independent suit filed by them, or by an application to intervene in the anti-trust action in which the judgment was entered, followed by further proceedings within that action to enforce the provisions of the judgment by contempt proceedings. Plaintiffs have elected to follow neither of these available remedies. Sam Fox Publishing Co. v. United States, 366 U. S. 683 (1961) presented an entirely different factual situation from that which we have in this action. There, Fox, itself a member of ASCAP, sought to intervene in a special proceeding filed to modify the consent final judgment in a Government anti-trust suit filed against ASCAP. Fox, as a member of ASCAP, sought to intervene so that it might effect a revision in management of ASCAP affairs and in the methods of distribution of royalties amongst the ASCAP membership. Permission to intervene was denied, but it was noted that Fox had available to it a remedy in an action filed by it against ASCAP to regulate the internal affairs of that association and the distribution of its income.

Cascade Natural Gas Corporation v. El Paso Natural Gas Co., 386 U. S. 129 (1967) supports our position as to the remedies available to plaintiffs. It recognizes the right of intervention in a Government anti-trust suit by one who makes a showing that he is directly affected by and a beneficiary of provisions in the final judgment. The intervention is limited to the action in which the final judgment was entered and by application to the Court which entered it.

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It is still the law that "private and public actions were designed to be cumulative, not mutually exclusive" (United States v. Borden Co., 347 U. S. 514, at 518). Plaintiffs may file their separate independent actions for injunctive relief or for treble damages, alleging in such action facts constituting anti-trust violations.

The plaintiffs contend that, since defendant New York Telephone does not do any business in New Jersey, and was not a party to the original action in New Jersey, unless this Court has jurisdiction to entertain this action as to this defendant, New York Telephone "could thumb its nose with immunity at the district court and escape punishment therefor." Aside from the fact that it might be difficult for this corporate entity to engage in such unseemly gestures, this is not so under the law or the facts of this case. Paragraph V of the judgment provides that:

> "The defendant A T & T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services, ..."

Although New York Telephone Company was not a named defendant in the New Jersey action, it is bound by and subject to the provisions of the final judgment because it is a wholly owned subsidiary of A. T. & T. and the conduct of its corporate and business affairs is dictated, directed and controlled by its sole stockholder, A. T. & T. Few would be so foolhardy as to question the jurisdiction of the New Jersey Court to issue process bringing either New York Telephone or its officers before it on a citation for contempt.

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We hold that this action must be dismissed for lack of jurisdiction over the subject matter. For this Court to undertake to decide whether a defendant named in an action filed in another District Court was guilty of a violation of the provisions of a final judgment entered in that action, and if found to be guilty, to undertake to fix and impose just punitive measures, would be an impertinent and unjustifiable intrusion on the jurisdiction of the other Court. Such a course, if pursued, would lead to confusion as to the construction to be placed upon the final judgment, a multitude of independent proceedings in numerous jurisdictions, and would defeat the very purposes of the final judgment (Cf. Dunham v. United States, 289 F. 376 (5th Cir., 1923); Steller v. Hardman, 324 F. 2d 626 (2nd Cir., 1963)).

Quite aside from the dismissal of this action, we find total absence of a showing to support the granting of the injunctive relief sought by plaintiffs.

The Clerk is directed to forthwith enter a judgment dismissing the complaint for lack of jurisdiction over the subject matter. So ordered.

SYLVESTER J. RYAN
U. S. D. J.

Dated: December 7, 1967.

U. S. District Court
S. D. of N. Y.
Filed
Dec. 8, 1967

PRÊME COURT, U. S.

FILED
JUN 6 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967

No. 1404

CLARK WALTER & SONS, INC.,

Appellant,

—vs.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

DONALD B. KIPP,
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Western Electric Company,
Incorporated and American
Telephone and Telegraph
Company

PITNEY, HARDIN & KIPP
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Supreme Court of the United States

October Term, 1967

No. 1404

CLARK WALTER & SONS, INC.,

Appellant,

—vs.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

Appellees, Western Electric Company, Incorporated (hereinafter referred to as "Western Electric"), and American Telephone and Telegraph Company (hereinafter referred to as "A. T. & T.") move pursuant to Rule 16 of the Revised Rules of this Court (1) to dismiss this appeal on the ground that it is not within the jurisdiction of this Court, because not taken in conformity to statute, or, in the alternative, (2) to dismiss the appeal or affirm the Order of the United States District Court for the District of New Jersey because the question on which the decision of the cause depends is so unsubstantial as not to warrant further argument.

Questions Presented

1. Does the Expediting Act authorize a direct appeal to this Court from a District Court's denial of an application to intervene for the purpose of advancing private business interests?

2. Does one not a party to a government civil antitrust proceeding which results in a consent decree before any testimony has been taken have the right, long after the entry of that decree, to intervene purportedly to "enforce" such decree?

Statement

This purports to be a direct appeal pursuant to the Expediting Act of 1903 (15 U.S.C. § 29) from an Order entered in the United States District Court for the District of New Jersey denying the application of Clark Walter & Sons, Inc. (the Appellant herein) to intervene as a party plaintiff in a civil antitrust proceeding many years after the entry of a Consent Judgment. The suit was instituted by the United States of America against Western Electric and A. T. & T. on January 14, 1949. On January 24, 1956 it culminated in the entry of a Consent Judgment. The Appellant was never a party to the proceeding, and its application to intervene in the proceeding twelve (12) years after the entry of the Judgment and nineteen (19) years after the institution of the suit was found by the District Court to be without precedent and unwarranted.

The Complaint filed by the United States of America against Western Electric and A. T. & T. on January 14, 1949 alleged violations of Sections 1, 2 and 3 of the Sherman Act (15 U.S.C. §§ 1-3), and sought injunctive

relief under Section 4 of the Sherman Act (15 U.S.C. § 4). The defendants filed their Answer on April 27, 1949 denying the violations. The Final Judgment entered on January 24, 1956 recited, consonant with Section 5 of the Clayton Act (15 U.S.C. § 16), that it was entered on consent of the parties without trial or adjudication of any issues of fact or law, without constituting any evidence or admission by any party in respect of any such issues, and before any testimony was taken (JS* 6a).

The Judgment (JS 6a-27a) is complex and extensive. It contains numerous provisions dealing with a variety of matters, including the kinds of equipment which may be manufactured and the kinds of businesses which may be engaged in; distributorships; contractual relations with purchasers; acquisition of securities or assets; cost accounting methods; licensing of patents; acquisition or disposal of patents or patent rights; furnishing of technical information; and division of fields of manufacture, sale or distribution of equipment. It is significant that only in one specific area (not here involved) is a non-party permitted to invoke the jurisdiction of the District Court, *i.e.*, inability to reach agreement with respect to the licensing of patents or the furnishing of technical information and, then, only for the limited purpose of obtaining a judicial determination of reasonable royalties and other terms of a patent license agreement or reasonable charges payable under a technical information agreement. (Paragraphs X(B) and XIV(G)). In all other situations implementation as well as enforcement of the Judgment is left to the parties.

The Judgment (Paragraph XVII) provides for the retention of jurisdiction by the District Court to permit any of the parties—*i.e.*, the United States of America,

* Refers to Appellant's Jurisdictional Statement.

Western Electric or A. T. & T.—to apply to the District Court for the construction, enforcement, modification or termination of the Judgment, or the punishment of violations (JS 24a-25a):

> "Jurisdiction is retained for the purpose of enabling *any of the parties* to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, or the modification or termination of any of the provisions thereof or for the enforcement of compliance therewith or for the punishment of violations thereof." (Emphasis supplied)

For purposes of securing compliance with the Judgment duly authorized representatives of the Department of Justice are permitted reasonable access to defendants' books and records and to interview their officers or employees; and information thus obtained is not to be divulged to anyone outside of the Department except in certain limited situations (Paragraph XVI at JS 24a).

The District Court denied the Appellant's application to intervene pointing out that "[T]his is an action which was commenced nineteen years ago and was settled by consent twelve years ago. A non-party to that action now seeks to reopen the case, and I do not think that it would serve the public interest to permit that" (JS 4a). The Court observed that but for *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the Appellant "wouldn't have any grounds on which to argue" (Tr.* 2), and found that case "not in point from the

* Refers to transcript of February 26, 1968 hearing before the Court below.

ndpoint of facts" (JS 3a). He determined among other ngs that (JS 3a):

"• • • the weight of authority seems to be very strongly against allowing intervention in antitrust suits brought by the Government in the public interest. However, we have a little more than that type of situation here, from a factual standpoint. Here as distinguished from the El Paso case there was a consent decree. Considerable time has elapsed since the entry of that consent decree."

It is suggested in Appellant's Jurisdictional Statement t A. T. & T. and its operating subsidiaries have vioed the Judgment, and that the District Court found h a violation. Thus it is stated that the "affidavits subtted by Clark Walter in support of intervention were contravened by the other parties" (JS 3). As a re- t Appellant would have this Court believe that "in 7, New Jersey Bell re-entered the private communicans business" (JS 4); and that "A. T. & T. is currently contempt, no tariff for the Hospital Interphone ever ving been filed by New Jersey Bell" (JS 6). These tements, apparently derived from an allegation made y "on information and belief", are not only erroneous, y represent a complete reversal of the Appellant's ition below.

n its brief filed with and in support of its moving ers below, Appellant asserted that it "does not at this e set forth its position on the merits"; that the "issue ore the District Court at this time is not whether apant is correct in its allegation that defendants are lating the consent decree"; and that "only the right the applicant to intervene" was involved. In their wering brief Western Electric and A. T. & T., while

"vigorously disput[ing] any suggestion that defendants have violated the Judgment", agreed "that to argue the merits at this time would constitute an unwarranted imposition upon this [District] Court". In its reply brief the Appellant re-confirmed its prior position, asserting that "the sole question currently confronting this Court is whether applicant satisfies the criteria of Rule 24" and reiterating that "this motion is not the proper occasion for an argument on the merits". And at the oral argument below Appellant's counsel advised the Court, "I am not asking you to rule on the merits" (Tr. 18).

In deciding the case, the Court below did not find (as the Appellant represents) that the Appellant's moving papers established a violation of the decree (JS 6, 10). Indeed the Court made it clear that it was not expressing "any opinion as far as the merits are concerned" (JS 3a), and specifically stated that "I can't reach [the] conclusion" that there was a violation of the decree, and that "I am not reaching the merits" (Tr. 18).

The case below then was presented by the Appellant on one basis, and answered by the Appellees and decided by the District Court on that basis. The mercurial efforts of Appellant to inject the merits into these proceedings for the first time on this appeal are improper.

ARGUMENT

POINT I

The Appeal Should Be Dismissed Because the Expediting Act Does Not Confer Jurisdiction on This Court in This Case.

This direct appeal from a District Court order has improperly been filed in this Court. The purpose of the Expediting Act, pursuant to which the appeal purports to have been brought, is to provide for direct review by this Court of issues of "great and general importance". 36 Cong. Rec. 1679 (1903). It is not applicable where, as here, a non-party seeks to advance its private business interests.

In *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39 (1963), *mod. on rehearing*, 375 U.S. 994 (1964), where an earlier consent decree in a civil antitrust suit brought by the government had established machinery for court supervision of the issuance of certain copyright licenses by ASCAP, petitioners sought an order directing ASCAP to issue a particular type of license. The District Court held that the decree did not authorize it to compel the issuance of the particular type of license which petitioners sought. *United States* v. *ASCAP*, 208 F. Supp. 896 (S.D.N.Y. 1962). Shenandoah filed parallel appeals to the Second Circuit and to this Court. This Court dismissed the appeal for lack of jurisdiction (*Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 371 U.S. 540 (1963) (*per curiam*)), and the Second Circuit dismissed the appeal before it, also for lack of jurisdiction, on the ground that the Expediting Act provided the sole means of appeal (*United States* v. *ASCAP*, 317 F.2d 90 (2d Cir. 1963)). On petition for a writ of certiorari, this Court reversed,

holding that the Expediting Act did not apply under the circumstances (375 U.S. at p. 40):

> "The dismissal that we heretofore entered was based on our unexpressed view that the appeal from an ancillary order of this type was not within the Expediting Act. Direct appeals to this Court are authorized by that Act only from final judgments where the United States is a complainant. The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party. [Citations omitted.] The controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned."

To the same effect are *United States* v. *ASCAP*, 341 F.2d 1003 (2d Cir. 1965), *cert. denied sub nom. Metromedia, Inc.* v. *ASCAP*, 382 U.S. 877 (1965), and *Metromedia, Inc.* v. *ASCAP*, 382 U.S. 38 (1965) dismissing *per curiam* a parallel appeal from the District Court.

These authorities establish the principle that private and ancillary interests, although arising in the framework of a government civil antitrust suit, are not to be given extraordinary appellate treatment under the Expediting Act. That principle is plainly applicable to the instant case.

Only two appeals have been found which purported to have been brought under the Expediting Act, involving attempted intervention under Rule 24 by a private appellant to "enforce", for the benefit of its own interests, a decree entered in a government antitrust suit. *Lupton Mfg. Co.* v. *United States*, 388 U.S. 457 (1967); *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 (1960). In *Westinghouse*, the District Court denied a

motion to intervene alleging violation of a consent judgment. *United States* v. *Radio Corporation of America*, 186 F. Supp. 776 (D.C. Pa. 1960). *Lupton* involved the denial of a similar motion alleging violation of a litigated judgment. *United States* v. *Aluminum Co. of America*, 41 F.R.D. 342 (D.C. Mo. 1967). In both cases this Court dismissed the appeals *per curiam*. It is submitted that this Court should do likewise in this case.

POINT II

The Judgment Below Should Be Affirmed or the Appeal Dismissed Because the Appellant Clearly Had No Right to Intervene and the Question Presented by the Appeal Is So Unsubstantial as Not to Require Further Argument.

A. One Not a Party to a Civil Proceeding Initiated by the Government for Enforcement of the Antitrust Laws and Which Results in a Consent Decree Before Any Testimony Has Been Taken, Does Not Have the Right, Many Years After the Entry of That Decree, to Intervene In Such Proceeding to Assert That Such Decree Has Not Been Complied With.

Rule 24 conditions intervention of right* upon a showing that the applicant is "so situated that the *dispo-*

* We do not understand the Appellant to suggest that the District Court abused its discretion in not granting permissive intervention. Rule 24(b) provides that "anyone may be permitted to intervene in an action . . . when an applicant's claim . . . and the main action have a question of law or fact in common". However, the Appellant's claim in an independent suit would have to be that the alleged conduct of the defendants violates the antitrust laws; it could not claim that such conduct violated the consent decree of the District Court, as it asserts in this proceeding. (15 U.S.C. § 16) In the one case the question is whether conduct is inconsistent with a statute; in the other case the question is whether conduct is inconsistent with a decree. These questions do not involve common questions of law or fact.

sition of the action may as a practical matter *impair or impede* his ability to protect" an interest relating to the property or transaction which is the subject of the action. The Rule clearly requires timely intervention prior to *"disposition"*, that is, entry of Judgment. However, in this case the action has long since (twelve years ago) been disposed of by Judgment. The Appellant was in no way *"impaired or impeded"* by such disposition in its ability to pursue its remedies under 15 U.S.C. § 15 or § 26. Those remedies are still available today.

It is worthy of note that the Appellant does not cite a single case for the proposition that intervention is available *after the entry* of a consent judgment entitled to the protection of the proviso of Section 5 of the Clayton Act (15 U.S.C. § 16). The Consent Judgment in these proceedings clearly falls within the scope of that proviso:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken* * * *." (Emphasis supplied)

Congress has made clear that the purpose of the proviso is to encourage defendants to settle cases instituted by

the Government before trial. Sen. Doc. 584, 63rd Cong., 2nd Sess., p. 6, 51 Cong. Rec. 15638, 15824, 15825, 16276. The Consent Decree process is essential to antitrust enforcement. During recent years between 70% and 80% of the antitrust injunctive suits brought by the Department of Justice have been terminated by consent decrees. Note, 81 Harv. L. Rev. 69, 224 (1967); Hearings on S. 2512 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pp. 86-87.

It is clear that the Appellant is precluded from suing on the Consent Judgment for treble damages (15 U.S.C. § 15), or injunctive relief (15 U.S.C. § 26). Its application to intervene in these proceedings was an attempt to accomplish by indirection what it was prevented by explicit legislation from doing directly.

The Consent Judgment entered in this case in 1956 permits *"any of the parties"* to apply to enforce its provisions. What the Appellant sought below was to intervene to modify the terms of the Judgment, so as to permit one (with an alleged grievance) who was *not* a party to seek to enforce it. Such a possibility was clearly not within the contemplation of the parties or the District Court when the Judgment was entered in 1956.

The reasoning of the Second Circuit in *United States* v. *ASCAP*, 341 F.2d 1003 (2d Cir. 1965), *cert. denied sub nom. Metromedia, Inc.* v. *ASCAP*, 382 U.S. 877 (1965) is dispositive of the application to intervene in this case. In that case Metromedia, Inc., a radio broadcaster, sought to punish ASCAP for contempt by reason of an alleged violation of a consent judgment entered in a prior government antitrust suit against ASCAP, to which Metromedia was not a party. The District Court dismissed the

proceeding on the ground that Metromedia did not have standing to bring it.

In affirming, the Second Circuit said (341 F.2d at pp. 1007-08):

"• • • [W]e hold that Metromedia lacks standing to move in this government antitrust action to punish the defendant ASCAP for contempt. Metromedia is not a party to the action and, indeed, could not have intervened as of right.

• • • • •

"• • • [T]he government is the sole proper party to seek enforcement of government antitrust decrees. The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. *Thus, the fact that the court retains jurisdiction in an antitrust action does not mean, unless the decree should expressly provide otherwise, that persons affected by the judgment, but not parties to it, can invoke the court's jurisdiction to alter or enforce the terms of the decree.*

"Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights." (Emphasis supplied)

To permit the Appellant to assert private rights under the 1956 Consent Judgment would, as pointed out in *United States* v. *Bendix Home Appliances, Inc.*, 10 F.R.D. 73, 77 (S.D.N.Y. 1949), "tend to defeat the policy behind the distinction drawn by Section 16 between litigated decrees and consent decrees." To allow intervention by a non-party, as in the instant case, "would be to disregard the intentions of the parties when they consented to the decree and asked the approval of this Court". *United States* v. *Radio Corporation of America*, 186 F. Supp. 776 (D.C. Pa. 1960), *appeal dismissed per curiam, sub nom. Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 (1960).*

B. The *El Paso Natural Gas* Case, Upon Which Appellant Relies, Is Not Apposite.

Appellant's primary reliance on this appeal (as it was below) upon this Court's opinion in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) is completely unwarranted. *El Paso* was a case of unique facts entirely dissimilar in all material respects to the present proceeding. It involved intervention (1) prior to judgment (not twelve years later), (2) for the purpose of assisting the court in formulating (rather than "enforcing") the judgment, (3) subsequent to the mandate of

* Even in the case of a litigated judgment entered in an antitrust suit instituted by the government it has long been held that third parties may not sue on the judgment, but must proceed with their remedies under the antitrust statutes. Were it otherwise such a judgment would constitute conclusive evidence against a defendant rather than *prima facie* evidence, as provided in § 5(a) of the Clayton Act. *Ida Amusement Corp.* v. *RKO Pictures Corp.*, 1954 Trade Cas. para. 67,837 (S.D.N.Y. 1954) and *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002 (S.D.N.Y. 1948). *A fortiori* a third party should not be permitted through the vehicle of intervention to constitute a consent judgment conclusive evidence against a defendant.

this Court, which had not been obeyed, ordering divestiture after a full trial of the issues (rather than solely upon consent of the parties without trial or adjudication of any issue of fact or law).

Nothing in *El Paso* expressly or by implication overrules the line of cases (pp. 11-13, *supra*) which have, without exception, denied intervention after the entry of a consent judgment in a Government antitrust suit.

Nevertheless, the Appellant suggests that there may be confusion as to the scope of the *El Paso* case, and points to the unreported decision of the Hon. Sylvester J. Ryan in the Southern District of New York, *New Jersey Communications Corp., et al.* v. *American Telephone and Telegraph Company, et al.*, 67 Civil 3632 (S.D.N.Y., Dec. 8, 1967). It is suggested that that case held that "Rule 24 authorized intervention by private parties seeking to enforce consent decrees". The *New Jersey Communications Corp.* suit had been initiated by various companies in the private communications field and their trade association to have the Consent Judgment filed in the Court below construed and enforced by the United States District Court for the Southern District of New York. Judge Ryan summarily dismissed the Complaint for lack of jurisdiction over the subject matter. In the process, by way of dictum, he observed that the dismissal would not leave plaintiffs without an alternative since they could bring an independent action under the antitrust laws or apply to intervene in the Court below, citing as authority the *El Paso* case. The question of the right of the *New Jersey Communications Corp.* plaintiffs to intervene in the Court below was not, of course, before Judge Ryan, and was unnecessary to his decision. Judge Ryan did not purport to decide the right to intervene in these proceedings, leaving to the United States District Court for the District

of New Jersey the decision on such an application. Appellant's effort to elevate Judge Ryan's passing dictum to the status of a "conflicting * * * decision" constitutes an imposition upon this Court.

At least four cases decided since *El Paso* have indicated that it is limited to its unique circumstances, and have denied Rule 24 intervention by a private party in a Government-instituted antitrust proceeding particularly where, as here, remedies adequate to protect the applicant's private interest are available. *United States* v. *Aluminum Co. of America*, 41 F.R.D. 342 (D.C. Mo. 1967), *appeal dismissed per curiam, sub nom. Lupton Mfg. Co.* v. *United States*, 388 U.S. 457 (1967); *United States* v. *Blue Chip Stamp Company*, 272 F. Supp. 432 (D.C. Cal. 1967), *aff'd per curiam, sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968); *City of New York* v. *United States* (N.D. Ill., Nov. 27, 1967), *aff'd per curiam* (No. 1141), 36 U.S.L.W. 3371, 3404 (Sup. Ct., April 22, 1968); and *School District of Philadelphia* v. *United States* (N.D. Ill., Nov. 27, 1967), *aff'd per curiam* (No. 1146), 36 U.S.L.W. 3371, 3404 (Sup. Ct., April 22, 1968).

In the *Aluminum Co.* case, an application was made, as here, by an alleged competitor for leave to intervene and for an order to show cause why the defendant should not be adjudged to have violated provisions of the final judgment, entered after full trial of the issues several years before, requiring independent operations by Alcoa and its subsidiary. The District Court denied intervention citing the "considerable authority to support the view that no one other than the government should be permitted" to intervene in antitrust litigation instituted by the Government after the entry of judgment. 41 F.R.D. at 344. The decision of the Court was rendered approximately a month

before this Court's opinion in *El Paso*. Thereafter, on appeal and subsequent to its disposition of the *El Paso* case, this Court dismissed the *Aluminum Co.* appeal *per curiam*.

United States v. *Blue Chip Stamp Company, supra,* involved a consent decree. In denying a motion to intervene to attack the decree, the District Court distinguished the *El Paso* case on the grounds that in *El Paso* the motion to intervene was made *before* the entry of the judgment, and stated that "*El Paso* cannot be taken as authority for the proposition that intervention may be permitted *after* entry of a consent decree." 272 F. Supp. at 437 (Emphasis supplied). This Court affirmed *per curiam*.

Finally in *City of New York* v. *United States* and *School District of Philadelphia* v. *United States,* the District Court for the Northern District of Illinois ruled that state and local governments as purchasers of children's books had no right to intervene under Rule 24 in order to oppose entry of a proposed consent decree in a government antitrust suit charging publishers with price fixing conspiracies. This Court likewise affirmed *per curiam*.

For the reasons stated above, the District Court was clearly correct in its determination that Rule 24 may not be utilized to subvert the protection afforded by statute to the parties to a consent decree entered before the taking of testimony and without trial or adjudication of any issue of fact or law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed on the ground that it is not within the jurisdiction of this Court, because not taken in conformity to statute, or, in the alternative, that the appeal should be dismissed or the Order of the District Court for the District of New Jersey should be affirmed, because the question involved is so unsubstantial as not to warrant further argument.

Respectfully submitted,

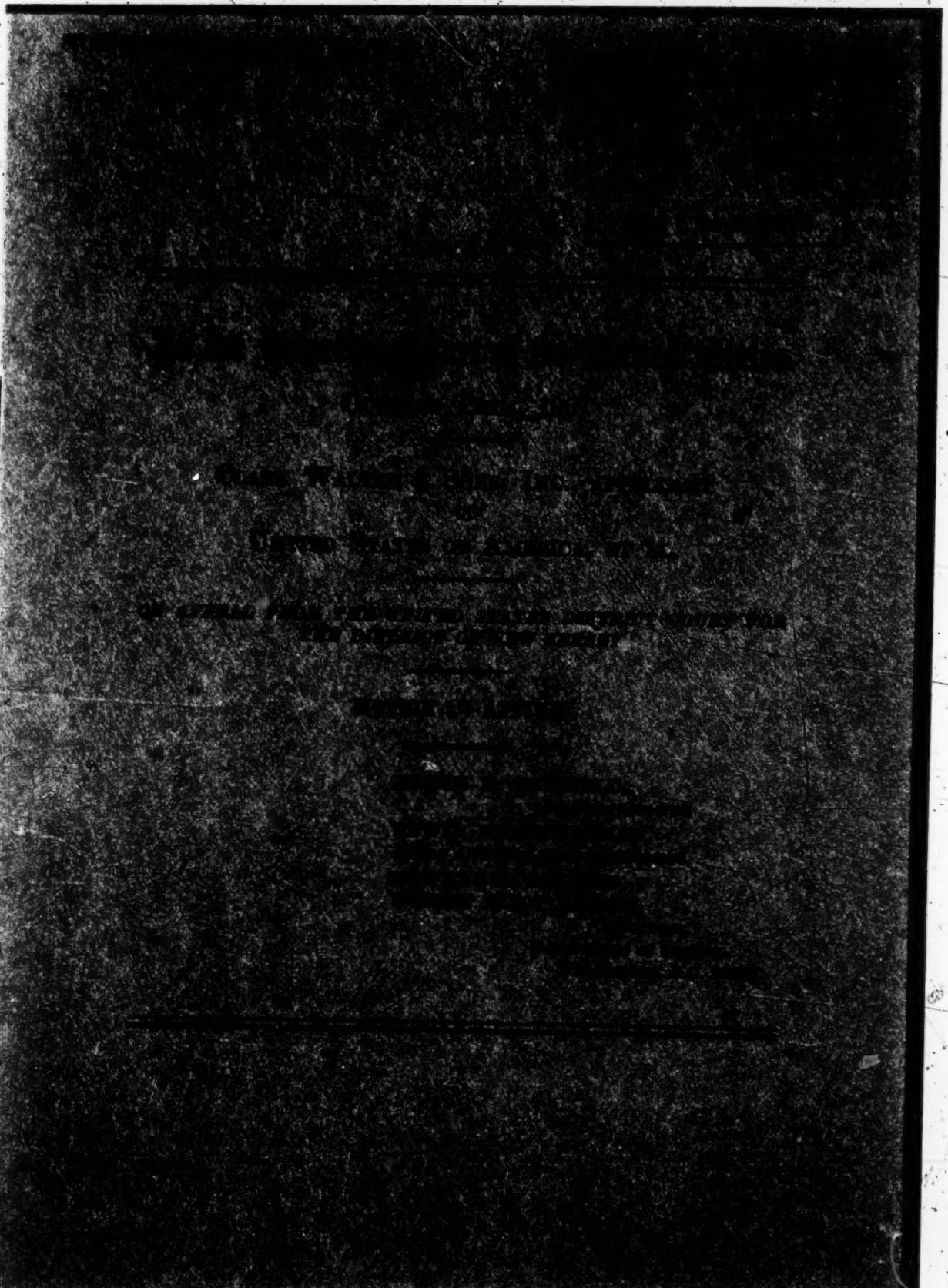
/s/ DONALD B. KIPP

DONALD B. KIPP

/s/ JAMES C. PITNEY

JAMES C. PITNEY
Counsel for Appellees, Western Electric Company, Incorporated and American Telephone and Telegraph Company

Dated: June 6, 1968.



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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1404

CLARK WALTER & SONS, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from an order of the district court (J.S. 1a) denying appellant's motion to intervene as a party plaintiff in the proceedings below for the purpose of enforcing by contempt proceedings a consent decree entered twelve years ago in a government antitrust action.

1. On January 14, 1949, the United States filed a civil antitrust complaint against Western Electric Company, Inc. and American Telegraph & Telephone

Company (hereinafter sometimes referred to as "AT&T" and "the Bell Companies"). AT&T and its subsidiaries constitute the largest telephone operating company in the United States; Western Electric is the Bell system's manufacturing branch. The Government alleged that the defendants were violating Sections 1, 2 and 3 of the Sherman Act (15 U.S.C. 1, 2 and 3) by monopolizing the manufacture of telephone equipment and by preventing the competitive development of alternate methods of communication through various agreements, patent license restrictions and other means.

After extended negotiations the parties reached a settlement which was embodied in a consent decree which the district court entered on January 24, 1956 (J.S. 6a). The decree is complex and covers many areas, including the types of business in which the companies may engage, patents and patent licensing, allocation of fields of manufacture, disclosure of technical know-how and other matters. It expressly retains jurisdiction in the district court "for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders * * *" as might be necessary to carry out its provisions (§ XVII, J.S. 24a–25a). Non-parties are allowed to invoke the court's jurisdiction for the limited purpose of having the court set royalties and other terms under patent licenses and other agreements which the decree makes mandatory (J.S. 15a, 22a–23a).

Section V is the portion of the decree pertinent here. It enjoins AT&T from "engaging, either di-

rectly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services * * *" (J.S. 11a). Section II(i) defines "common carrier communications services" as follows (J.S. 8a):

> (i) "Common carrier communications services" shall mean communications services and facilities, other than message telegram service, the charges for which are subject to public regulation under the Communications Act of 1934, or any amendment thereof, or would be subject to such regulation thereunder if such a service or facility were furnished in interstate commerce; and shall also include any communications service or facility, other than message telegram service, the charges for which are or become subject to regulation under existing or future laws of any state, territory, or the District of Columbia, but only in the jurisdiction or jurisdictions in which the charges for such service or facility are subject to regulation.

The Department of Justice interprets "common carrier communications services" as so defined to mean any communications service subject to actual regulatory jurisdiction, federal or local. The purpose of this definition is to limit AT&T's business to regulated fields, so that state and federal regulation will be available to protect the public against competitive abuses and excessive or discriminatory rates.

2. Appellant is a distributor of private communication systems, including hospital nurse call systems, in northern New Jersey (J.S. 38a–42a). In July

1967, appellant complained to the Department of Justice that AT&T was violating Section V of the consent decree, which appellant construed as barring the Bell Companies from entering the field of private communications. According to the appellant's representations, the Bell Companies had begun to introduce in appellant's territory an audio visual nurse call system that competed with one of its products. It requested that the Department enforce Section V to prevent the Bell Companies from marketing this device.

After receiving several assurances from the Department that its complaint was being studied (J.S. 45a–46a), appellant, on January 22, 1968, filed motions to intervene as a plaintiff under Federal Rule of Civil Procedure 24 and (J.S. 30a) "to enforce judgment and to hold defendants in contempt." The United States and the defendants opposed appellant's application to intervene.[1]

After full hearing the district court denied appellant's motion in an oral opinion. It expressly declined to reach the merits of appellant's claim that the

[1] In its opposition, the government advised the district court that in its view "the activities complained of are not barred by the consent decree insofar as the nurse call services have been offered by AT&T under tariffs which subject the charges therefor to regulation." Memorandum of the United States in Opposition to the Motion of Clark Walter and Sons to Intervene, p. 3. Apparently, no tariff for this service has been filed by the Bell Companies in New Jersey (J.S. 44a), but their counsel does not admit that the service has been offered there (transcript, Feb. 26, 1968, p. 20).

decree had been violated (J.S. 3a).[2] The court recognized the propriety of allowing intervention in "extraordinary circumstances" such as existed in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (J.S. 4a). Finding (J.S. 3a) that "[t]he Government has not repudiated its obligation to act in the public interest in the enforcement of the decree," and noting that the action was begun 19 years ago and had been settled 12 years ago, the court ruled that it would not serve the public interest to permit a non-party to intervene to enforce the consent decree. Such interventions, the court concluded, would discourage consent decrees. "Moreover," the court added, "if every party who could allege that it was the beneficiary of an antitrust decree could enter the picture to enforce the decree, we would have a volume of litigation that would be almost impossible for the Court to handle" (J.S. 4a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration. The district court correctly denied intervention as of right and did not

[2] In its brief in support of its motion to intervene and in oral argument to the district court (transcript, Feb. 26, 1968, p. 18), appellant expressly said it was not then asking for a ruling on the merits. The district court observed, "It is contended here that the private communications system does not fall within the category of 'common carrier communications system,' and there seems to be very little doubt about that. Although I should qualify that statement by adding to it that the observation is made only on the basis of what has come to my attention through the moving papers. I don't intend that comment to indicate any opinion as far as the merits are concerned." (J.S. 2a–3a). Thus there is no basis for appellant's suggestions (J.S. 6, 10) that the court below believed AT&T had violated the decree.

abuse its discretion in denying permissive intervention.

1. Appellant was not a party to the United States' suit to enforce the antitrust laws against AT&T and Western Electric, and it took no part in the negotiation of the consent decrees approved by the district court twelve years ago. This is not a case such as *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U.S. 502, where the decree provided for its enforcement by someone other than the United States. This decree permits a non-party to appear here only if it is unable to reach an agreement with AT&T as to the terms of a licensing agreement made mandatory by the decree (Pet. 15a, 22a–23a).

In these circumstances, appellant lacks standing to initiate contempt proceedings. *United States* v. *ASCAP (Metromedia, Inc.)*, 341 F. 2d 1003 (C.A. 2), certiorari denied, 382 U.S. 877; cf. *Amalgamated Utility Workers (C.I.O.)* v. *Consolidated Edison Co. of New York*, 309 U.S. 261.[1]

This result rests upon sound reasons. The Attorney General has, and must have, broad discretion to decide when to initiate suits under the antitrust laws and how negotiated consent decrees are to be administered and enforced. *Swift & Co.* v. *United States*, 276 U.S. 311, 331–332; *United States* v. *Borden Co.*, 347 U.S. 514, 519; *United States* v. *Ward Baking Co.*, 376 U.S. 327. Thus, in the *Metromedia* case, *supra*, the court of appeals rejected a third party's attempt—such as appellant's—to enforce a government anti-

[1] See, also, *United States* v. *R.C.A.*, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed *sub nom. Westinghouse Broadcasting Co.*, v. *United States*, 364 U.S. 518; *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002–1004 (S.D.N.Y.); cf. Restatement, *Judgments*, §§ 79, 93.

trust decree through independently initiated contempt proceedings. The court observed that the Attorney General's discretion "requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. * * * Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights" (341 F. 2d at 1008).

These considerations are, as the court below observed (J.S. 4a), particularly apt here. AT&T's operations, and the decree in this case, are nationwide in scope. There are many who might feel themselves aggrieved by a practice of AT&T. All have private remedies that are available independently of the consent decree. But when it comes to instituting contempt or other enforcement proceedings, it is the Attorney General who is charged with, and uniquely able to implement, the responsibility of investigation and balancing the many conflicting considerations, so that he alone should have the standing to institute contempt and other proceedings for enforcement of the consent judgment.

2. Federal Rule of Civil Procedure 24(a)(2) permits intervention when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter

impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Appellant's ability to protect its interest in the general subject matter of the government's suit—AT&T's competitive practices—is not impaired or impeded in any practical sense simply because it cannot enforce the government's consent decree in this case. Nothing prevents appellant from obtaining the full measure of the injunctive relief it seeks—and treble damages as well—by filing its own suit under the antitrust laws. (15 U.S.C. 4, 26.)

Of course, if appellant could proceed under the consent decree, it might be unnecessary for it to pursue the private antitrust remedies Congress has given it. But it does not follow that requiring appellant to follow such independent course "impair[s] or impede[s]" its ability effectively to protect its own interest within the meaning of Rule 24(a)(2). On the contrary, where the interest sought to be protected through intervention is the avoidance of another independent suit, we submit that the thrust of the Rule is to guarantee participation only where the failure to enforce the extant decree may have some direct, affirmatively detrimental impact upon the conduct of an independent suit. The lack of such collateral benefits as would flow from a contempt citation here does not constitute the kind of impairment or impediment the Rule is designed to avoid. Cf. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Calif.), affirmed *per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580; *City of New York, et al.* v. *United States*, Nos. 1141 and 1146, O.T., 1967 (Motion to Affirm granted April 22, 1968). Thus, where

private party seeks intervention in a government
titrust suit, because it is dissatisfied with the At-
rney General's conduct of the litigation or interpre-
tion of the decree, intervention normally should be
nied.[4]

This result is entirely consistent with the decision
Cascade Natural Gas Corp. v. *El Paso Natural Gas*
., 386 U.S. 129. In that case, intervention was held
propriate because the government had consented to
lief short of the divestiture directed by this Court's
rlier mandate. Moreover, there could be only
e divestiture, as a practical matter, and the inter-
nor's private right of action was therefore not a
actical alternative to intervention. Such special cir-
mstances meant that intervention was the only effec-
e method by which third parties could protect their
terest in the character of the divested business.[5]

Compare *Cascade Natural Gas Corp.* v. *El Paso Natural*
Co., 386 U.S. 129, with *United States* v. *Blue Chip Stamp*
, *supra*; *Lupton Mfg. Co.* v. *United States*, 388 U.S. 457;
neer National Title Ins. Co. v. *United States*, 385 U.S.
2; *City of New York, et al.* v. *United States*, Nos. 1141 and
6, O.T., 1967 (decided April 22, 1968). Cf. *Central Bank and*
st Co. v. *United States*, Nos. 1269 and 1270, O.T., 1967
cided May 27, 1968).

The Department has chosen to implement its concern with
ons of AT&T and other carriers which appear unreasonably
estrict competition in communications services and equipment
urging in a number of pending administrative proceedings
elimination or modification of tariff restrictions which pre-
independent suppliers (like appellant) from selling equip-
t to subscribers which could be used with, and attached to,
regular telephone system. This solution would remove present
iers to competition in appellant's field. This course is being
ued before the Federal Communications Commission in the
ler-phone investigation, F.C.C. Docket Nos. 16942, 17073, and
ne Federal Communications Commission's inquiry into com-
r-communications, F.C.C. Docket No. 16979.

3. The same considerations demonstrate that the district court did not abuse its discretion in denying permissive intervention under F.R. Civ. P. 24(b). Cf. *Sutphen Estates* v. *United States*, 342 U.S. 19, 23; 4 Moore's Federal Practice, 24.10(4) at 62 (2d ed).[6]

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

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JUNE 1968.

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[6] Appellant also urges that the decision below is inconsistent with *New Jersey Communications Corp.* v. *AT&T* (S.D.N.Y., No. 67 Civil 3622), (unreported, reprinted at J.S. 47a). In that case a complaint by a third party based on the same decree involved here was dismissed by the United States District Court for the Southern District of New York on the ground that exclusive jurisdiction to enforce the decree was vested in the court below. In so doing, the court remarked (Pet. 52a) that the plaintiffs there could file an independent antitrust action or seek "to intervene in the anti-trust action in which the [consent] judgment was entered * * *." But even if this *dictum* is thought to reflect a view that such intervention should be allowed, it does not take account of the authorities discussed in this motion.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CLARK WALTER & SONS, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 1404. Decided June 17, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE FORTAS are of the opinion that probable jurisdiction should be noted and the case set for oral hearing.